SUBJECT INDEX.

	Page
STATEMENT OF CASE	1
Body Color an Element	3
Advertising and Publicity	4
Infringement and Unfair Trade	5
Evidence of Confusion	9
Circuit Court of Appeal's Decision	10
BRIEF OF ARGUMENT	13
Basis of Remedy	13
Good Will	13
Invasion of Good Will	14
Ordinary Purchasers	15
Good Will of Petitioner	16
Extent of	16
Who are Customers	16
Character of Product	17
How Product is Sold	17
Petitioner's Mark and "Dress"	17
Originality	17
Essential Features	18
Color an Element	18
Exclusive Use	19
Twenty Years as Against the World	19
Publicity Given	19
Secondary Meaning	20
Good Will of Respondent	21
The "Magnolia Brewery"	21
Other Labels	21
Respondent Adopts and Uses New Label and Dress	21
Knowledge of Petitioner's Marks, Label, "Dress" and extent of Good Will	21
Duty Toward Petitioner	22
Essential Features compared	23
Respondent's New Label is Invasion and Fraud	23
Intent to Commit Fraud	23
Resemblances	23
Abandonment of Old Name	24
Inducement of Agents	24

Page

Deception 25
Instances 25
Confusion 25
Substitution 26
Conclusion 26

ARGUMENT
Basis of Remedy 26
Good Will 27
Invasion of Good Will..... 27

Good Will of Petitioner..... 31
Extent of 31
Who are Customers 32
Character of Product 33
How is Product Sold 34

Petitioner's Mark and "Dress"..... 35
Essential Features 37
Color 38

Exclusive Use 43
Twenty Years as Against the World..... 46
Publicity Given 45

Good Will of Respondent 48
"Magnolia Brewery" 48
Other Labels 49

Respondent Adopts and Uses New Labels and "Dress" 49
Knowledge of Petitioner's Marks, Labels, "Dress" and Extent of Good Will..... 49
Duty Toward Petitioner 50
Essential Features compared 50

Respondent's New Label is Invasion and Fraud..... 53
Intent to Commit Fraud..... 53
Abandonment of Old Name..... 55
Inducements of Agents..... 58
Deception 60
Evidence 63
Confusion 64, 69
Substitution 71
Conclusion 77

INDEX OF CITATIONS.

	Page
Ainsworth vs. Walmsley, L. R. Eq. 518	24
Aluminum Co. vs. Nat'l Aluminum Wks., 226 Fed. 815	20
American Etc. Co. vs. Licking Co., 158 Fed. 690	20
American Etc. Co. vs. Saginaw Co., 103 Fed. 281	13
Amoskeag vs. Spear, 4 N. Y. Sup. Ct. 599	22
Amoskeag vs. Trainer, 101 U. S. 51	18, 25, 68
Anheuser-Busch Co. vs. Clark, 26 Fed. 410	15, 18, 41
Avery vs. Meikle, 81 Ky. 73	24
Baker vs. Baker, 77 Fed. 181	22
Battle vs. Finlay, 45 Fed. 796	15
Bauer vs. Order of Monks, 120 Fed. 78	19
Bell vs. Bell, Cox Man. § 514	24
Borden vs. Borden, 201 Fed. 510	13, 14
Brooklyn White Lead Co. vs. Masury, 25 Barb. 416	14, 27
Brown vs. Mercer, 37 N. Y. Supr. Ct. 265	24
Burke vs. Cassin, 45 Cal. 467	24
Burt vs. Smith, 71 Fed. 161	18
Carbolic Co. vs. Thompson, 25 Fed. 625	18, 22
Cauffman vs. Schuler, 123 Fed. 205	19, 23, 55
Celluloid Co. vs. Cellonite Co., 32 Fed. 94	24
Champion vs. Mosler, 233 Fed. 112	20, 22
Chapin vs. Hendler, 231 Fed. 555	22
Chickering vs. Chickering, 198 Fed. 958	23
Chittendon vs. Whitbeck, 50 Mich. 401	27
Chivers vs. Chivers, 17 R. P. C. 420	23, 55
Cleveland S. Co. vs. Wallace, 52 Fed. 431	19
Coca-Cola vs. Gayola, 200 Fed. 720	22, 68
Coca-Cola vs. Koke Co., 235 Fed. 408	20
Cochrane vs. MacNish, 13 P. C. 100	15, 17, 30, 35, 62
Colman vs. Crump, 70 N. Y. 573	14
Collinspat vs. Finlayson, 88 Fed. 693	15, 25
Colman vs. Farrow, 15 R. P. C. 198	24
Cook vs. Ross, 73 Fed. 203	24
Cresent Tool Co. vs. Kilborn, 247 Fed. 299	20
Cuervo vs. Landauer, 63 Fed. 1003	25
Cyc. Vol. 38, 760	14
Cyc. Vol. 38, 789	22
Davids vs. Davids, 233 U. S. 461	20
Delaware vs. Clark, 13 Wall. 311	18
DeLong Co. vs. American Pin Co., 200 Fed. 66	14, 22
DeVoe vs. Wolff, 206 Fed. 420	15, 20, 24, 69
Drake vs. Glessner, 68 Ohio St. 337	19

Page

Draper vs. Skerrett, 116 Fed. 206..... 15
Edge vs. Johnson, 9 R. P. C. 134..... 24
Electro Co. vs. Trask, 59 How. Pr. 189..... 24
Fairbanks vs. Bell, 77 Fed. 869....14, 18, 23, 24, 29, 41, 54, 56
Farina vs. Cathery, Cox Man. 275..... 24
Fischer vs. Blank, 138 N. Y. 245.....15, 18, 31
Fleischman vs. Starke, 25 Fed. 127..... 19
Florence Co. vs. Dowd, 178 Fed. 73..... 14, 15
Fox vs. Glynn, 191 Mass. 344..... 13, 68
Fuller vs. Huff, 104 Fed. 141..... 24, 25
Gaines vs. Turner, 204 Fed. 553..... 69
Garret vs. Garret, 24 C. C. A. 173.....13, 14, 68
Grocers' Supply Co. vs. Depuis, 219 Mass. 576..... 13
Gulden vs. Chance, 182 Fed. 303.....14, 18, 42, 68
Hanover Milling Co. vs. Metcalf, 240 U. S. 403..... 13, 26
Hanson vs. Siegel-Cooper, 106 Fed. 690..... 19
Heilman Co. vs. Independent Brg. Co., 191 Fed. 489.....
.....13, 14, 17, 41
Helmet Co. vs. Wrigley, 245 U. S. 824.....18, 22, 42, 56, 58
Herring-Hall vs. Safe Co., 208 U. S. 554..... 23
Hires vs. Consumers Co., 100 Fed. 807..... 24
Hopkins on Trademarks, Sec. 115, p. 276..... 26, 75
Hostetter vs. Adams, 10 Fed. 838..... 19
Hostetter vs. Becker, 73 Fed. 297..... 68
International S. Co. vs. Rogers, 72 N. J. Eq. 933..... 23
Johnson vs. Bauer, 82 Fed. 622..... 18
Kentucky Co. vs. Wathen, 110 Fed. 641..... 13
Kerry vs. Toupin, 60 Fed. 272..... 18
Kostering vs. Seattle Brg. Co., 116 Fed. 620.14, 17, 25, 31, 41, 62
Lalance vs. National S. & E. Co., 109 Fed. 317.....19, 24, 57
Lambert vs. Kalish, 219 Fed. 323..... 24
Landreth vs. Landreth, 22 Fed. 41..... 19
Lawrence vs. Tenn., 138 U. S. 537..... 18
Leschen vs. Broderick, 201 U. S. 166..... 39
Liebigs' Co. vs. Chemists' Co., 13 R. P. C. 635.....15, 25, 62
Liggett vs. Hynes, 20 Fed. 883..... 15, 28
Little vs. Kellam, 100 Fed. 353..... 24
Lorillard vs. Peper, 86 Fed. 956..... 52, 53
Lorillard vs. Wight, 15 Fed. 383..... 19
Lover vs. Goodwin, 4 R. P. C. 492..... 24
Ludlow vs. Pittsburg Co., 166 Fed. 29..... 22
McAndrews vs. Bassett, 4 DeG. J. & S. 385..... 24
McCann vs. Anthony, 21 Mo. App. 83..... 18
McLean vs. Fleming, 96 U. S. 245.....18, 23, 40

Page

Merriam vs. Oglivie, 170 Fed. 168..... 23
Merriam vs. Saalfield, 190 Fed. 934..... 23
Moline Plow Co. vs. Omaha Co., 235 Fed. 519..... 22, 50
Morgan vs. Wendover, 43 Fed. 420..... 26, 76
Morgan Sons vs. Whittier, 118 Fed. 651..... 19, 67
Moxie vs. Baumbach, 32 Fed. 213..... 24
Moxie vs. Daoust, 206 Fed. 434.....15, 17, 22, 30
National Biscuit Co. vs. Baker, 95 Fed. 135..... 19, 67
National Biscuit Co. vs. Swick, 120 Fed. 1007....15, 19, 25, 42
Newcomer vs. Scriven, 168 Fed. 623..... 39
New Enlgand Co. vs. Marlborough, 168 Mass. 154...39, 41, 68
Ohio B. Co. vs. National B. Co., 127 Fed. 116.....15, 18, 42
Omaha Plow Co. vs. Omaha Stores Co., 235 Fed. 519.... 22
Paris Co. vs. Hill, 102 Fed. 148..... 23, 54
Pillsbury vs. Pillsbury, 64 Fed. 841.....14, 15, 23, 26
Postum Cereal Co. vs. American H. F. Co., 119 Fed. 848. 52
Pratt's Appeal, 117 Pa. S. 401..... 24
Rathbone vs. Champion, 189 Fed. 26..... 26, 76
Reed vs. Frew, 162 Fed. 887..... 23
Reynolds vs. Allen, 151 Fed. 819..... 19
Rogers vs. Rogers, 77 Fed. 181..... 24
Rogers Co. vs. Simpson, 54 Conn. 545..... 14
Royal vs. Royal, 122 Fed. 337..... 23
Rubber Co. vs. DeVoe, 67 Rep. 357, 1916..... 20
Scheuer vs. Miller, 20 C. C. A. 161..... 18
Schlitz vs. Interboro Brg. Co., quotation..... 33
Scriven vs. North, 134 Fed. 366..... 18
Seixo vs. Provezende, L. R. 1 Ch. App. 192..... 15, 22
Shaver vs. Heller, 108 Fed. 821..... 22
Shaw Co. vs. Mark, 12 Fed. 889..... 15
Shredded W. Co. vs. Humphrey, 250 Fed. 960..... 20, 22
Simmons vs. Simmons, 81 Fed. 163..... 15, 29
Sterling vs. Spermine, 112 Fed. 1000..... 19
Stuart vs. Stewart, 91 Fed. 243..... 18
Taylor vs. Taylor, 23 Law Journal Ch. 255.....23, 24, 55
United Co. vs. Barthel Co., 221 Fed. 456..... 20
United Drug Co. vs. Rectanus, 206 Fed. 570..... 69
Upper Assam Tea Co. vs. Herbert, 7 R. P. C. 183..... 15
Von Mumm vs. Frash, 56 Fed. 830.....14, 19, 25, 62, 67
Vulcan Co. vs. Meyers, 139 N. Y. 364..... 19
Walker vs. Grubman, 222 Fed. 478..... 22
Walker vs. Hockstaeder, 85 Fed. 776..... 23, 55
Waterman vs. Drug Co., 202 Fed. 167..... 15
Wilkinson vs. Griffith, 8 R. P. C. 370..... 24
Wolf Bros. vs. Hamilton, 206 Fed. 611..... 68
Wrigley vs. Colker, 245 Fed. 907.....18, 22, 43, 57
Wrigley vs. Grove, 183 Fed. 99.....14, 18, 30, 42

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 326.

JOSEPH SCHLITZ BREWING COMPANY,

Complainant and Petitioner,

vs.

HOUSTON ICE & BREWING COMPANY, H. HAMILTON, R. L. AUTREY, JAMES H. STUDDART, JESSE ANDREWS, JOSEPH F. MEYERS, B. A. REISNER and D. ROSSI, as Trustees of the Houston Ice & Brewing Association, under a declaration of trust dated October 20, 1914, and otherwise as successors and assigns of the said Houston Ice & Brewing Company,

Defendants and Respondents.

Brief and Argument for the Petitioner.

STATEMENT OF CASE.

This cause comes to this court upon a writ of certiorari to the Circuit Court of Appeals, Fifth Circuit, granted March 16, 1918.

The appeal to the Circuit Court of Appeals was from a final decree dismissing the bill of complaint herein, entered in the District Court of the Southern District of Texas on the 11th day of April, 1916. The opinion is reported in 241 Federal 817.

The complaint was filed March 20, 1914. The facts and evidence adduced upon final hearing in March, 1915, are as follows:

The petitioner's predecessor, Joseph Schlitz, commenced the brewing of beer in Milwaukee in 1848. In 1874 the business which had developed extensively was incorporated in the state of Wisconsin under the name of Joseph Schlitz Brewing Com-

pany, and the product of the petitioner became an article of commerce in all of the states of the United States where beer was permitted to be sold and in foreign countries.

The defendant, Houston Ice & Brewing Company, for a number of years was the agent of the petitioner in the state of Texas and made sales in Louisiana. It also is a brewer of beer and markets its products in the states of Texas, Louisiana and in Mexico and other localities tributary to the city of Houston and the state of Texas.

The petitioner, Joseph Schlitz Brewing Company, marketed a part of its product in bottles which were filled and sealed at the brewery. During the six years prior to the commencement of this cause, in 1913, the petitioner marketed of this product three hundred fifty million (350,000,000) bottles which were distributed over the United States and foreign countries. (Trans. p. 42.) Outside of English speaking countries it shipped beer to Central and South America, Japan, China, India, Italy, Costa Rica, Cuba, Ecuador, Honduras, Spanish Honduras, Nicaragua, Mexico, Panama, Porto Rico and San Domingo; and fifty million (50,000,000) bottles or one-seventh of the entire product sold in bottles was sold in the state of Texas, the territory tributary to the city of Houston, where the respondent was located. Between 1900 and 1912 the respondent sold and caused to be sold eight hundred seventeen (817) carload and half carload shipments, which would be approximately twelve million (12,000,000) small size bottles of the petitioner's product. All the beer shipped on account of the Houston Ice & Brewing Company was bottled in dark brown bottles and labeled with the light brown body colored export label of the petitioner. (Trans. pp. 47, 48, 132.)

In 1893 the petitioner desired to more distinctively label its product and thereupon caused inquiries to be sent to numerous breweries and about forty lithographing companies, and accumulated twenty-two or twenty-three hundred labels of different kinds, and adopted a label, the general outline of which

is shown on page 119 of the transcript of record, trademark No. 26385. (Trans. p. 40, 119.)

Pursuant to the statutes of the United States as amended by an act of Congress approved on the 20th day of February, 1905, application for a new registration of the label, under the law as amended, was made, and was allowed on the 1st day of May, 1906. The certificate is numbered 52011. (See copy Trans. p. 120.) Pursuant to subsequent amendments of the Federal Trademark Law and amendments of foreign laws and treaties, the general trademark, the "Belted Globe," as well as the label were re-registered in the United States Patent Office on March 4, 1913, and July 16, 1912, respectively. (Copy Trans. 118; Copy Trans. p. 138.)

BODY COLOR AN ELEMENT.

The most striking result of the investigation just referred to was this: *Not one label was found which did not have the natural color of the paper, that is white, as a body color, and the letterpress marks and other indicia in other* colors or black. (Trans. pp. 50, 51, 82.)

The Joseph Schlitz Brewing Company was at this time bottling three different brands or grades of beer, viz., "Export," which was especially brewed and bottled for interstate and foreign trade; "Dark," a beer made from caramalized malt, resembling the "Bavarian" or "Munich" beers in taste and color; and "Pale," a beer of very light color and small alcoholic content, resembling the "Bohemian" or "Budweiser" beers. The last named brands were put out to meet a demand in territory lying contiguous to Milwaukee, and neither was intended or manufactured for export trade.

These labels were adopted not because the body colors of the labels harmonized with the color of the bottles which contained the beer, but with the view of distinguishing Schlitz

labels from those of other breweries, all of which had white as a body color; and also to indicate the color of the beer which the bottle contained. (Trans. p. 51.)

The solid body color of these labels was such an innovation and was so strikingly different from the body color of the other beer labels that they were called "bay rum labels" by the trade, because a popular bottled bay rum was then being marketed bearing a label with a body color other than white. (Trans. p. 41.)

From 1894 to 1912 ninety per cent (90%) of the bottled beer marketed by the Joseph Schlitz Brewing Company has been the so-called "Export" beer (Trans. p 41), which bore the export label, the light brown body colored label with white letterpress, blue figure at the left, and distinctive arrangement shown on the trade mark label, and this label was attached to all beer sold by the respondent for the petitioner between the years 1900 and 1912.

Beginning with April, 1911, all Schlitz beer bottled at the brewery was put up in brown bottles. (Trans. p. 42.)

ADVERTISING AND PUBLICITY.

After the adoption of the brown body label the Brewing Company launched an extensive campaign of advertising its beer bottled in brown bottles, bearing a brown label with letterpress in white. During the years 1900 to 1912, both inclusive, Two Million One Hundred Thousand Dollars ($2,100,000.00) were expended for various advertising mediums (Trans. pp. 45-47), ninety per cent (90%) of which, however, referred directly to the brown label of which "Exhibit D" is a copy. (Trans. p. 54.) Practically all of these advertising media, with the exception of advertisements appearing in newspapers, and magazines of general circulation, showed either the labels in fac simile colors, or pictures of a brown bottle bearing the label

in fac simile colors. (Y-1 to Y-8, both inclusive, are samples of signs and lithographic advertising matter which were in use during the years 1902 to 1911 and of which upwards of eighty thousand (80,000) were distributed throughout the United States and other countries, "Exhibits BB" to "BB3," both inclusive, are copies of magazine advertisements, and "CC" to "CC4," both inclusive, are copies of newspaper advertisements which appeared generally throughout the country in the years 1906 to 1912. "Exhibit F" shows the amount of advertising done in the newspapers in the state of Texas. "Exhibit Q" is a record of the billboard advertising in fac simile colors done in the state of Texas.)

During the years 1904 to 1912 the brewery furnished its agents and customers with letterheads, billheads, envelopes and other stationery of various sizes, of which "Exhibits S and X" (Trans. pp. 129-130) are samples, exceeding eighty million (80,000,000) in number All of this stationery bore a fac simile copy, in miniature, of the brown body colored label.

RESPONDENT'S INFRINGMENT AND UNFAIR TRADE.

Soon after respondent ceased to be the agent of petitioner, and in the summer of 1913, it adopted and used a brown label upon beer put up in brown bottles, which label was in such striking similitude to the petitioner's label exclusively used for nearly twenty years, that petitioner notified respondent to stop the use of the label. (Trans. p. 22.)

The first infringing label and the one upon the use of which the suit was started was similar to the label of petitioner in the following particulars:

It was used upon a brown bottle, the color of bottle then uniformly used by petitioner.

It has a light brown body color, the color adopted by peti-

tioner in 1894 and since used by it in the marketing of its "Export" beer, the brand sold in Texas and other territory supplied by respondent, and the color used on all of the beer sold by respondent for petitioner while its agent in that locality.

It had white characteristic script, and block lettering and a white marginal line, in relatively the same location as these elements are found upon petitioner's label.

Respondent had changed the color of the annular ring from red to blue in similitude to the blue color of the globe on petitioner's label.

The size of the respondent's label was uniform and larger than the label used by petitioner upon small bottles. Comparison may be made, however, by reference to the plaintiff's physical "Exhibits B" and "D," small bottles with petitioner's and respondent's labels thereon, respectively, filed with the complaint and transmitted to this court.

Respondent's attorneys disclaimed any intention on the part of the respondent to infringe petitioner's label, and offered to change the label to the one disclosed on "Exhibit J" to the answer (Trans. p. 23), the respondent's label. In this label there was a change in the distinctive "S" and paraph similar to petitioner's exclusive design, but the coloring and arrangement of the principal features remained the same.

In June, 1914, the respondent was still using the original infringing label, "Exhibit C" to the complaint, but offered when the answer was filed at that time to use "Exhibit J" when the supply of one million (1,000,000) "Exhibit C" labels aforesaid was exhausted, although on May 21, 1914, it asserted in the patent office the exclusive right to use the particular style of lettering shown in "Exhibit C" upon a trade mark application, and asserted that no other person had a right to use a mark in resemblance thereto upon sworn declaration of its right to that letterpress in November, 1914. (Trans. p. 140.)

Notwithstanding the above claims to the style of lettering in similitude to the petitioner's, the respondents, prior to the trial

of the cause in District Court, had again changed the label used by it to one disclosed in "Exhibit L." (Trans. p. 146.) This third label had the general appearance of the former labels, but two details of the letterpress, the characteristic "S" and the paraph, were again somewhat modified.

The last label was not directly in issue, but Mr. Autrey, on the hearing in District Court, testified it was the label they were using in March, 1915; that they changed the "S" again from the one used in "Exhibit J" because that was more ungainly and inartistic. (Trans. p. 109.)

In August, 1913, a carload of respondents' bottled beer, put up in the new "dress," the brown label, was sent to a dealer at Bryan, Texas. Clarence Selvage, a representative of John T. Barbee Company, wholesale and retail liquor dealers of Louisville, Kentucky, was at the time visiting this dealer at Bryan, in his capacity as a traveling salesman, and, on the arrival of the carload of respondent's beer, was misled into the belief that the respondent's product put up in the brown glass bottle with the light brown label with white script lettering was in fact "Schlitz" beer. (Trans. p. 60.)

About the same time Louis Anderson, proprietor of the Brazos Hotel at Houston, Texas, in which a bar is operated, was similarly confused. At the bar of the Brazos Hotel respondent's beer was carried only in clear glass bottles bearing white labels. The only beer sold at this bar in brown bottles bearing a brown label was "Schlitz Export." (Trans. p. 79.)

Anderson was at a bar other than at his own when he first saw the new package of the Houston Ice & Brewing Company. He had called for "Southern Select." He was served with a bottle of "Southern Select" put up in a brown bottle bearing a brown label with ornamental script in white. His testimony relating to the incident, appears on page 79 of the transcript:

> "I was served with a bottle of beer and I thought it was 'Schlitz.' I called the bartender's attention to it, and he said, 'that is Southern Select,' and then I examined it. I said 'you made a mistake. You served me Schlitz beer and

I ordered Select.' I then read the label and saw it was 'Select.' I had to read the label in order to tell the difference."

Selvage was in the habit of stopping at the Brazos Hotel of which Anderson was the proprietor.

Selvage's conversation with Autrey, the secretary of the respondent, in the bar-room of the Brazos Hotel, is given on page 69 of the transcript (Trans. p. 69). Among other things he says:

"I told him I thought it was the cleverest imitation I ever saw * * * * * when Schlitz gets hold of you * * * * * he will not prosecute you for imitation, he will prosecute you for counterfeit." (Trans. p. 69.)

It is undisputed, although the respondents deny any responsibility for the acts of their agents and representatives, that dealers in the petitioner's product were visited by agents and representatives of the Houston Ice & Brewing Company soon after it had adopted the brown bottle with the brown label, soliciting orders and suggesting the brown label as the inducement.

On one occasion the agent told petitioner's dealer that the Houston Ice & Brewing Company was putting up beer in brown bottles, with a brown label, similar to the Schlitz label, and that he could handle it right along with Schlitz. (Trans. p. 80.) On another that he could sell beer of the respondent's in brown bottles with the brown label for Schlitz and make more money by selling it. (Trans. p. 58.)

At another time a dealer was told he could sell "Southern Select" in brown bottles with the brown label for Schlitz, and the dealer admits that he did sell it for Schlitz to men who could not read. (Trans. p. 88.) And on still another occasion the dealer was told that there is no use selling Schlitz, "you can sell 'Southern Select' for the same purpose—the label and everything is alike." (Trans. p. 76.)

The most naive explanation of the circumstance related by the witness *Tomlinson* (Trans. p. 80), is furnished by one Craeger, who is an agent of respondent. The court examined this witness concerning his visit to petitioner's witness, Tomlinson, a storekeeper at Stafford, Texas. (Trans. p. 106.) Craeger said:

> "I know a man engaged in the saloon business at Stafford by the name of Tomlinson. I think maybe three years ago I sold him one or two casks of beer, that was all * * *. The last time I called while (I was) standing there (telephoning) they were unloading Schlitz beer and that was called to my attention, and I told him I had a better beer in a black bottle *with a brown label,* and he told me what Schlitz cost him and I told him I had as good or better than Schlitz. Sold for less money."
>
> *Court:* Why did you say that your beer was put up in brown bottles with a brown label?
>
> *A.* Well, Schlitz was put up in a brown bottle with a brown label."

EVIDENCE OF CONFUSION.

Petitioner will not further extend this Statement of Facts, but merely cites the numerous instances disclosed by the record in which bartenders and others used to handling beer in bottles were confused and made mistakes because of the striking similarity between the petitioner's and respondent's packages (Trans. 59, 61, 73, 75, 81, 104), and to the instances of actual palming off of defendant's goods as and for the goods of the petitioner, related on Trans. pp. 64, 69, 70, 76, 77, 86, 88 and 91.

The hearing of the cause before the District Court was concluded in April, 1915. April 11, 1916, a decree was entered dismissing the complaint, but no findings were made by the court and no opinion filed. Petitioner appealed to the Circuit Court of Appeals. The case was argued before that court February 27, 1917, and on April 28, 1917, the Circuit Court of Appeals filed its opinion affirming the judgment of the District Court. Because of what petitioner's counsel conceived to be an erroneous application of the rule as to trademark rights when color

is an essential element, petitioner filed a motion for rehearing.

On October 4, 1917, an order denying the motion for rehearing was filed and on December 31, 1917, a petition for a writ of certiorari was presented to this court and granted, and certiorari and return filed April 25, 1918.

CIRCUIT COURT OF APPEALS' DECISION.

Assignments of Error.

On the appeal of this cause to the Circuit Court of Appeals petitioner filed an assignment of errors. (Trans. pp. 150 to 160, both inclusive.)

Under the assignments numbered I., II., IV., VII. and IX., the facts set forth in the Bill of Complaint and proved upon the hearing of the cause, as now stated herein, should have entitled petitioner to the relief prayed for.

Many of these facts are summarized by the Circuit Court of Appeals in its opinion so that we may refer directly to the Statement of Facts disclosed by the opinion of the Circuit Court of Appeals indicating only such statements as are contrary to the admitted statements in the record.

> "The plaintiff's brewery and shipping point is in the city of Milwaukee and that of the defendant in Houston, Texas. Both plaintiff and defendant are engaged in selling bottled beer throughout the state of Texas and are in direct competition with each other. The plaintiff had for twenty years or more distributed its beer in brown bottles with brown labels. The defendant originally employed only white bottles with white labels, but for several years had used also the brown bottles in connection with the brown labels." (Trans. p. 179.)

To this statement may be added the statement of Mr. Bielfeld that petitioner jealously guarded its property right in this particular body colored label with its white letterpress and

blue figure thereon, and whenever any labels considered imitations were brought to its attention, steps were taken to stop the use of them.

> "The defendants had at one time been the distributing agents for the plaintiff's bottled beer in the state of Texas, but had ceased to be connected with the plaintiff for some time before suit was filed."

The exact date when the last shipment was made for the defendant by the petitioner was established by Mr. Bielfeld as June, 1912. (Trans. p. 48.) The defendant and respondent received the first bill for one million (1,000,000) labels, the original label indicated as "Exhibit C" on page 13 of the transcript, in September, 1913. The first evidence of the use of the brown label by the respondent was shortly before that date.

> "There was evidence as to cases of confusion and evidence tending to show intentional deception on the part of the soliciting agents of the defendants in the sale of their product, but the defendant denied authorization of any deception by their agents."

It is true, the petitioner did not discourage the resale of its bottles in Texas, and the precise question presented to the court was as indicated in the opinion:

> "The alleged infringement and unfair competition was based on the use by the defendants of a label on the bottles claimed to have resembled plaintiff's label so closely as to mislead purchasers to buy the product of the plaintiff when in fact they were buying that of the defendants * * *. Its exact contention is that the 'dress' of its bottled product in brown bottles with brown labels in *combination with certain other elements in the label peculiar to it*, is entitled to protection, and that the defendants by the use of a brown bottle with brown label and with certain imitative characteristics has violated its rights."

Although there is no evidence in the record that any other manufacturer used a brown label upon brown bottles, because of an alleged disclaimer of petitioner of the right to use the

color brown in and of itself as a trademark, the court restates the question thus:

> "The question, therefore, is whether the two labels are so alike in respects other than their own color and that of the containers, as to make it likely that, because of such other points of resemblance, the product of the defendant might be mistaken by purchasers for that of the plaintiff in the ordinary course of retailing beer. The determinative facts are, therefore, the points of resemblance and dissimilarity, in respects other than their general color, of the two labels, and their probable effect upon consuming purchasers of the beer." (Trans. p. 180.)

This conclusion is based on a misunderstanding of the duty of the defendant when it commenced to supply beer to the public in brown bottles with a brown label, in a field where brown bottles with the brown label were previously exclusively used by the petitioner, to so distinguish its goods that purchasers of petitioner's product would not be deceived by the general appearance of respondent's label, into the belief that they were purchasing petitioner's beer.

The court says: "A brown bottle with a brown label indicates to many the beer of the plaintiff."

The other assignments of error were not specially urged either on the original hearing or on the appeal. Petitioner confined its argument to the one proposition.

Did the respondent by the adoption of the label "Exhibit C" to the Bill of Complaint (Trans. p. 13), or the subsequent modifications of it retaining the color and general arrangement of elements, invade petitioner's property rights in the good will of its business or infringe the trademark label and dress of package which petitioner had adopted and exclusively used to extend and maintain that good will?

BRIEF OF ARGUMENT.

I.

BASIS OF REMEDY.

Relief against the infringement of a trademark, whether at common law or under the statutes, and against unfair competition, is afforded on the ground that the petitioner's property right in the good will of the business has been unlawfully invaded.

The true basis for affording a trader the private remedy rests in his property right in the good will of his business and in the marks, "dress" and other indicia employed to maintain and extend it. Any other basis is unsound and leads to illogical conclusions.

Hanover Milling Co. vs. Metcalf, 240 U. S. 403 (and cases therein cited).

Borden vs. Borden, 201 Fed. 510.

Kentucky etc. Co. vs. Wathen, 110 Fed. 641, 645 (and cases cited).

Fox vs. Glynn, 191 Mass. 344, 350.

American etc. Co. vs. Saginaw etc. Co., 103 Fed. 281; 50 L. R. A. 609.

Heilman Brg. Co. vs. Independent Brg. Co., 191 Fed. 489.

Grocers Supply Co. vs. Depuis, 219 Mass. 576; 107 N. E. 389.

Garret vs. Garret, 78 Fed. 472, 24 C. C. A. 173.

(a) *Good Will,* in general.

The good will of a business is a property right. It rests largely in the continued patronage of its customers and in the trademark, "dress" and other indicia employed to suggest the

origin of the goods to such customers as the business attracts. It makes no difference whether these customers are Texans or Mexicans; whether they are Cubans or Louisianans. It makes no difference whether these customers are wary or unwary; whether they are careful or careless; whether they are literate or illiterate; whether they stop to reflect or act upon the instant; or whether they read labels or do not read labels.

Brooklyn White Lead Co. vs. Masury, 25 Barb. 416.
Gulden vs. Chance, 182 Fed. 303.
Florence Mfg. Co. vs. Dowd, 178 Fed. 73, 75.
Rogers Mfg. Co. vs. Simpson, 54 Conn. 545.
Pillsburg vs. Pillsbury, 64 Fed. 841.
Von Mumm vs. Frash, 56 Fed. 830.
Coleman vs. Krump, 70 N. Y. 573, 578.

(b) *A Good Will may be invaded by Another Who Simulates Petitioner's Mark or "Dress."*

The good will of a business is deemed to have been unlawfully invaded when the marks, "dress" of goods and other indicia under which the business has been conducted have been simulated by another so that careless and unwary customers may possibly be deceived.

38 Cyc. 760, and cases cited.
Borden vs. Borden, 201 Fed. 510.
Fairbanks. vs. Bell, 77 Fed. 869; 23 C. C. A. 559 (labels shown in black and white).
Gulden vs. Chance, 182 Fed. 303.
De Long Co. vs. American P. Co., 200 Fed. 66.
Wrigley vs. Grove, 183 Fed. 99.
Kostering vs. Seattle Brg. Co. 116 Fed. 620; 54 C. C. A. 76.
Heilman vs. Independent Brg. Co., 191 Fed. 489.
Rogers vs. Simpson, 54 Conn. 545.
Garret vs. Garret, 78 Fed. 472; 24 C. C. A. 173.

National Biscuit Co. vs. Swick, 120 Fed. 1007.
Shaw Stocking Co. vs. Mark, 12 Fed. 889.
Anheuser-Busch Co. vs. Clark, 26 Fed. 410.
Pillsbury vs. Pillsbury, 64 Fed. 641; 12 C. C. A. 432.
De Voe Snuff Co. vs. Wolf, 206 Fed. 420 (and cases cited).
Ohio Baking Co. vs. National B. Co. (C. C. A. 6th Cir.), 127 Fed. 116, 120; 62 C. C. A. 116.
Waterman Co. vs. Drug Co. (C. C. A. 6th Cir.), 202 Fed. 167, 171.
Florence Mfg. Co. vs. Dowd (C. C. A. 2d Cir.), 178 Fed. 73, 75; 101 C. C. A. 565.
Upper Assam Tea Co. vs. Herbert, 7 R. P. C. 183.
Seixo vs. Provezende, L. R. 1 Cha. App. 192, 196.

(c) *Ordinary Purchaser—Character of Article—Manner of Sale.*

It is to protect the petitioner's right of selling its own that the law of trademarks and unfair competition has been established. It must include the right to sell all, to the cautious as well as the incautious. It must take into consideration (1) the character of the article; (2) the use to which it is put; (3) the kind of people who ask for it, and (4) the manner in which it is sold.

Cases *supra* and the following:
Battle vs. Finlay, 45 Fed. 796.
Liebigs vs. Chemists' etc., 13 R. P. C. 635; C. A. 13 R. P. C. 736.
Draper vs. Skerrett, 116 Fed. 206, 212.
Liggett & Meyer Co. vs. Hynes, 20 Fed. 883.
Collinspat vs. Finlayson, 88 Fed. 693.
Cochrane vs. MacNish, L. R. 1896; A. C. 225.
Simmons vs. Simmons, 81 Fed. 163.
Fischer vs. Blank, 138 N. Y. 245.
Moxie vs. Daoust, 206 Fed. 434.

II.

GOOD WILL OF THE PETITIONER.

(a) *Extent of Good Will.*

The good will of the Joseph Schlitz Brewing Company, which is a property right which the court will protect, rests, largely, in the probability that the old customers will continue their patronage and will not be misled or deceived into buying the product of another manufacturer as and for its product. The export beer of the petitioner put up in dark brown bottles with light brown labels, having thereon characteristic white script and block letterpress, and blue figure and shading, is marketed both in interstate and international commerce, and the mark, "dress" and indicia as used for twenty years constitute a part of the Brewing Company's good will. That good will is co-extensive with all states and countries where Schlitz beer is sold, including the states of Louisiana and Texas and the Republic of Mexico, where they had been in competition with the respondent for twenty years, using that characteristic "dress." (Trans. pp. 42, 46, 47, 101, 111.)

(b) *Who Are the Customers of the Petitioner?*

Schlitz beer is shipped to Central and South America, to Japan, China, India, Italy, Costa Rica, Cuba, Ecuador, Honduras, Spanish Honduras, Nicaragua, Mexico, Panama, Porto Rico and San Domingo. Upwards of fifty (50) dealers in Texas handle the Schlitz beer in bottles and the customers are recruited from all walks of life in Texas and Mexican cities. (Trans. p. 42.) It is sold to illiterate Spaniards and Mexicans (Trans. pp. 64-5); and to "common Mexicans" and "bankers" in Brownsville, Texas (Trans. p. 87); to casual customers and careless, at Temple, Texas (Trans. p. 73); to Spanish speaking people at Matamoras, Mexico (Trans. p. 85).

(c) *Character of Petitioner's Product.*

It is an inexpensive beverage. "A railroad company buying a locomotive engine would presumably give a fair degree of deliberation to the transaction and it would not be easy to deceive the purchaser." The case is quite different where the article sold is inexpensive.

(d) *How Is the Petitioner's Bottle Product Sold?*

People. who ask for beer at a bar are served a bottle over the counter and do not, at any rate as a rule, handle the bottle or examine the label. The contents are consumed on the spot and the bottle is retained by the seller.

Cochrane vs. MacNish (supra).
Moxie vs. Daoust, 206 Fed. 434.
Kostering vs. Seattle Brg. Co. (supra).
Heilman vs. Independent Brg. Co. (supra).
Trans. pp. 68, 76, 77, 78, 79, 81.

III.

PETITIONER'S MARK AND "DRESS."

(a) *Originality of Petitioner's Mark and "Dress."*

Trans. pp. 41, 42, 51, 82, 83.

Petitioner was the first appropriator of the solid body colored label in brown; it was the first brewer of beer to adopt the characteristic lettering and insignia used upon its brown label in white, and blue, and the color and arrangement of elements in its label, Exhibit "B" which it adopted in 1894 had not been previously appropriated by any other brewer or bottler of beer.

Delaware etc. Canal Co. vs. Clark, 13 Wall. 311.
McLean vs. Fleming, 96 U. S. 245.
Amoskeag Mfg. Co. vs. Trainor, 101 U. S. 51.

(b) *Essential Features of Petitioner's Mark and "Dress."*

Petitioner's Exhibit "B" filed with the complaint, also marked "Defendant's Exhibit W," submitted to this court.

(c) *Color an Element in Trademarks and "Dress" of Package.*

Wm. Wrigley, Jr. vs. Colker, 245 Fed. 907, 8 Trademark Reporter 55, where reprint of labels in colors is shown.
Anheuser-Busch Co. vs. Clarke, 26 Fed. 402.
Helmet Co. vs. Wrigley Co., 245 Fed. 824 (C. C. A. 6th Cir.).
Fairbanks Co. vs. Bell (supra).
McLean vs. Fleming (supra).
McCann vs. Anthony, 21 Mo. App. 83.
Fisher vs. Blank, 138 N. Y. 244.
[The marks and labels involved in the last four cases are reproduced in fac-simile colors in Cox's Trademark Manual.]
Johnson vs. Bauer, 82 Fed. 662; 27 C. C. A. 374.
Scheuer vs. Miller, 20 C. C. A. 161.
Lawrence vs. Tenn, 138 U. S. 537.
Stuart vs. Stewart, 91 Fed. 243; 33 C. C. A. 481.
Ohio Baking Co. vs. Nat. Biscuit Co., 127 Fed. 116.
Scriven vs. North, 134 Fed. 366; 67 C. C. A. 348.
Gulden vs. Chance, 182 Fed. 303.
Wrigley vs. Grove, 183 Fed. 99.
Kerry vs. Toupin, 60 Fed. 272.
Burt vs. Smith, 71 Fed. 161.
Carbolic Co. vs. Thompson, 25 Fed. 625.

Cleveland Stone Co. vs. Wallace, 52 Fed. 431.
Landreth vs. Landreth, 22 Fed. 41.
Lorillard vs. Wight, 15 Fed. 383.
Hostetter vs. Adams, 10 Fed. 838.
Von Mumm vs. Frash, 56 Fed. 830.
Fleishmann vs. Starkey, 25 Fed. 127.
Lalance vs. Nat'l E. & S. Co., 109 Fed. 317.
Morgan Sons vs. Whittier-Coburn, 118 Fed. 651.
Bauer vs. Order of Monks, 120 Fed. 178.
National B. Co. vs. Swick, 121 Fed. 1007.
Drake vs. Glaessner, 68 Ohio St. 337.
Caufmann vs. Schuler, 123 Fed. 205.
Hanson vs. Siegel-Cooper, 106 Fed. 690.
National B. Co. vs. Baker, 95 Fed. 135.
Sterling Co. vs. Spermine, 112 Fed. 1000.
Reynolds vs. Allen, 151 Fed. 819.
Vulcan vs. Meyers, 139 N. Y. 364.

IV.

EXCLUSIVE USE.

(a) *Petitioner's Exclusive Use of Its Marks, Brown Bottle, Brown Label, Bearing White Letterpress, for a Period of Twenty Years, as Against the World.*

Trans. pp. 42, 43, 44, 47, 52.
Petitioner's Exhibits F, G, H, I, J, K, L, M, N, O. 4, 16 and 17.

(b) *Publicity Given to Marks and "Dress" of Petitioner.*

Trans. pp. 41, 45, 46, 48, 52, and 54 to 57.
Petitioner's Exhibits Y-1 to Y-8, BB to BB-3, CC to CC-4, F, Q, S, X and DD.

(c) *Secondary Meaning.*

After twenty years of exclusive use for its bottled "Export" beer of the package exemplified by Exhibit "B" to the exclusion of the world, petitioner claims the right to those elements of this package which are original, arbitrary and fanciful, and indicate the origin of its goods. Petitioner contends that its good will is maintained and extended by its trademark label, which when first adopted and used by it, was novel and distinctive in combination, though at that time the use of some of the elements might have been publici juris, and should be protected by the courts, on the theory that after twenty years of exclusive use by the petitioner its mark has acquired a secondary meaning; has become identified with petitioner's product, and has become a part of its good will.

De Voe Snuff Co. vs. Wolff (6th Cir.), 206 Fed. 420.
American T. Co. vs. Licking Co., 158 Fed. 690.
Aluminum Co. vs. National Alum. Wks., 226 Fed. 815.
United L. & B. Co. vs. Barthel Co., 221 Fed. 456.
Coca Cola vs. Koke Co., 235 Fed. 408.
Rubber Co. vs. De Voe Co., 233 Fed. 150.
Davids vs. Davids, 233 U. S. 461.
Champion Co. vs. Mosler, 233 Fed. 112.

See also—

Crescent Tool Co. vs. Kilbourn, 247 Fed. 299.
Shredded Wheat Co. vs. Humphrey, 250 Fed. 960,

where the duty is imposed on defendant to distinguish where the appearance of an article has acquired a secondary meaning.

V.

GOOD WILL OF RESPONDENT.

(a) *The "Magnolia Brewery."*

Trans. pp. 106-108.

(b) *The "Magnolia" Brewery's first label was a white label with letterpress in black Spencerian script. An alleged trademark with a heavy annular ring in red was also shown. This label had been used by the respondent since 1893.*

Trans. pp. 107, 110, 111.

(c) *The "Magnolia" Brewery's other labels, all of which have been abandoned—"Reputation," "Milwaukee Exquisite," and "Magnolia Pale."*

Trans. pp. 111, 112, 113.

VI.

RESPONDENTS, COMPETITORS, AND FORMER AGENTS OF THE PETITIONER, ADOPT AND USE A NEW LABEL AND "DRESS" OF PACKAGE FOR BOTTLED BEER.

(a) *The "Magnolia" Brewery's knowledge of petitioner's marks, label and dress, and the extent of petitioner's good will, particularly in the states of Texas and Louisiana.*

Trans. pp. 47, 48, 110.
Petitioner's Exhibit "Z," on Transcript page 132.

(b) *Respondent's Duty Toward the Petitioner.*

The duty is imposed upon every manufacturer or vendor, in a field where he meets competitors, so to distinguish his marks, "dress" and labels under which he sells his goods from those of his rival or rivals that neither his marks, "dress" or labels will be likely to deceive the public or to mislead the illiterate, ignorant, unwary or careless buyer into purchasing his goods for those of a competitor, or to create confusion in the trade between his and a rival's articles.

Omaha Plow Co. vs. Omaha Store Co., 235 Fed. 519.
Shredded Wheat Co. vs. Humphrey, 244 Fed. (D. C.) 508.
Seixo vs. Provezende, 1 Chan. App. 192-194.
Helmet Co. vs. Wrigley, Jr. Co. 245 Fed. 824.
Amoskeag Co. vs. Spear, 4 N. Y. Spr. Ct. 599.
Wrigley Jr. Co. vs. Colker, 245 Fed. 907. (Labels shown in colors in Trademark Reporter, Vol. VIII, p. 55.)
Shaver vs. Heller Co., 108 Fed. 821, 831; 44 C. C. A. 48, 58; 65 L. R. 878.
Moxie vs. Daoust, 206 Fed. 434.
38 Cyc. 789 and cases cited Note 54.

See also:

Champion S. P. Co. vs. Mosler, 233 Fed. 112, 115.
Coca Cola Co. vs. Gayola Co., 200 Fed. 720; 119 C. C. A. 164; 211 Fed. 942; 128 C. C. A. 400.
Walker & Sons Co. vs. Grubman, 222 Fed. 478.
Chapin Mfg. Co. vs. Hendler, 231 Fed. 550, 555.
Ludlow Co. vs. Pittsburg Mfg. Co., 166 Fed. 29; 92 C. C. A. 63.
Delong Co. vs. Am. Pin Co., 200 Fed. 65.
Carbolic Soap Co. vs. Thompson, 25 Fed. 625, p. 627.
Walter Baker vs. Baker, 77 Fed. 181.

Pillsbury vs. Pillsbury, 64 Fed. 841.
Royal B. P. Co. vs. Royal, 122 Fed. 337.
Internat. Silver Co. vs. Rogers, 72 N. J. Eq. 933.
Herring, Hall vs. Safe Co., 208 U. S. 554, 560.
Merriam vs. Ogilvie, 170 Fed. 168.
Merriam Co. vs. Saalfield, 190 Fed. 934; affirmed, 198 Fed. 369.
Reed & Sons Co. vs. Frew, 162 Fed. 887.
Chickering vs. Chickering, 120 Fed. 69; 198 Fed. 958.

(c) *Essential Features of the Magnolia Brewery's New Label and "Dress" as Compared with Petitioner's Package. The Resemblances and Differences.*

VII.

THE NEW LABEL AND DRESS USED BY RESPONDENT ON A BRAND OF ITS BOTTLED BEER UNLAWFULLY INVADES PETITIONER'S PROPERTY RIGHT IN ITS GOOD WILL AND IS A FRAUD UPON THE PUBLIC.

(a) *The Intent to Commit Fraud.*

1. The resemblance between the petitioner's and respondent's marks and "dress" are not fortuitous and the court will assume that they are the result of a deliberate design.

McLean vs. Fleming, 96 U. S. 245.
Paris Medicine Co. vs. Hill, 102 Fed. 148, 151.
Caufman vs. Shuler, 123 Fed. 205.
Walker vs. Hockstaeder, 85 Fed. 776.
Fairbanks Co. vs. Bell (supra).
Taylor vs. Taylor, 23 Law Journal, Ch. 255.
Chivers vs. Chivers, 17 R. P. C. 420, 427.

De Voe Snuff Co. vs. Wolff, 206 Fed. 420.
Lambert vs. Kalish, 219 Fed. 323.

2. The abandonment of an old name, dress or mark and the adoption of a new one similar to a competitor is evidence of fraud.

Fairbanks Co. vs. Bell (supra).
Brown vs. Mercer, 37 N. Y. Super. Ct. 265.
Lever vs. Goodwin, 4 R. P. C. 492.
Avery vs. Meikle, 81 Ky. 73.
Electro Co. vs. Trask, 59 How. Pr. 189.
Celluloid Co. vs. Cellonite Co., 32 Fed. 94, 101.
Pratt's Appeal, 117 Pa. S. 401, 411.
Farina vs. Cathery, L. J. N. of C. 1867, p. 134; Cox Man. 275.
Bell & Co. vs. Bell, Cox Man. 574.
Colman vs. Farrow, 15 R. P. C. 198, 203.
Wilkinson vs. Griffith, 8 R. P. C. 370.
Edge vs. Johnson, 9 R. P. C. 134.
Lalance vs. Enameling Co., 109 Fed. 317.
Taylor vs. Taylor, 32 L. J. Ch. 256.
McAndrews vs. Bassett, 4 DeG. J. & S. 385.
Little vs. Kellam, 100 Fed. 353.
Burke vs. Cassin, 45 Cal. 467.
Rogers vs. Rogers, 77 Fed. 181.
Hires vs. Consumers Co., 100 Fed. 807.
Ainsworth vs. Walmsley, L. R. 1, Eq. 518.
Cook & B. vs. Ross, 73 Fed. 203.
Moxie vs. Baumbach, 32 Fed. 205.
Fuller vs. Huff, 104 Fed. 141, 144.

3. Agents and representatives of respondent employ respondent's new label and package as an inducement to commit fraud.

Trans. pp. 58, 76, 80, 81, 88, 108, 109.

(b) *Respondent's new label and "dress" of package may possibly deceive the careless or illiterate purchaser and thereby invade petitioner's good will; will probably deceive the careless and illiterate purchaser and thereby invade petitioner's good will. As a matter of fact respondent's new label and "dress" of package not only deceives customers of the petitioner but causes confusion in the retail trade.*

In cases of this character evidence of actual deception and confusion is not necessary. It is almost impossible to produce evidence of this kind.

Courts will grant relief against an infringement of a mark or unfair competition on a mere inspection of the marks, labels or "dress."

Kostering vs. Brewing Co., 116 Fed. 620; 54 C. C. A. 76.
Fuller vs. Huff, 104 Fed. 141.
National B. Co. vs. Swick, 121 Fed. 1007.
Liebigs vs. Chemists Co., 13 R. P. C. 635, 644.
Amoskeag Co. vs. Trainer, 101 U. S. 51, 63.
Von Mumm vs. Frash, 56 Fed. 830.
Cuervo vs. Landauer, 63 Fed. 1003.
Collinsplatt vs. Finlayson, 88 Fed. 693.

(This principle is well established. Further citation of evidence is deemed unnecessary.)

Petitioner produced evidence of actual deception and confusion.

(a) Deception of customers of petitioner. Instances of deception.

(b) Confusion in the retail trade.

VIII.

SUBSTITUTION BY TRICK OR ARTIFICE DIFFERENTIATED FROM SUBSTITUTION INDUCED BY A SIMULATED MARK, LABEL OR PACKAGE.

Hopkins on Trademarks (2d Ed.), Sec. 115, p. 276.
Morgan's Sons Co. vs. Wendover, 43 Fed. 420.
Rathbone vs. Champion, 189 Fed. 126.
Pillsbury vs. Pillsbury, 64 Fed. 841; 12 C. C. A. 432.

IX.

CONCLUSION.

ARGUMENT.

I.

Basis of Remedy.

In April, 1915, petitioner filed a printed brief and argument with the District Court, in which it contended that the remedy afforded for infringement of a trademark was the protection of the honest manufacturer's property right in his good will. This conclusion was amplified and repeated in the argument before the Circuit Court of Appeals. We deem it unnecessary now to repeat the argument then made, inasmuch as this court has announced the foregoing doctrine as the true basis for affording the remedy in trademark and unfair trade cases.

Hanover Milling Company vs. Metcalf, 240 U. S. 403.

(a) *Good Will.*

The good will, the property right which courts protect, has been variously defined: it comprehends the trademark, "dress" or insignia adopted to maintain and extend it; it extends to all of the customers of the particular business in which the mark, "dress" or insignia is used.

> "Good will has been defined by the courts to be the favor which the management of a business wins from the public and the probability that old customers will continue their patronage."
>
> *Chittenden vs. Whitbeck,* 50 Mich. 401.

> "It is to protect the plaintiff's right to sell their own that the law of trademarks has been introduced. It must include the right to sell to all, to the incautious as well as the cautious."
>
> *Brooklyn White Lead Co. vs. Masury,* 25 Barb. 516.

It is, therefore, incumbent upon the court in passing on questions involving the unlawful invasion of a good will to determine whether any of the lowliest customers of the petitioner have been deceived or fraudulently led astray.

(b) *Good Will May Be Invaded by Another Who Simulates Petitioner's Mark or "Dress."*

When a party has been in the habit of labeling his goods with a distinctive mark so that purchasers recognize the goods thus labeled as his product a competitor will be prevented from applying similar label or "dress" to a package of goods of the same description, for not to do so would permit the competitor by such simulation of the label to induce some purchasers to believe that the goods the competitor was selling were in fact the manufacture of another.

Trademarks or labels are not necessarily intended to be read by the consumer, and especially is this true where the mark is placed upon an article of small value, and which the consumer

does not always have the opportunity to examine and use. The very necessity or desirability of a mark or label to indicate origin or ownership, and the originality and distinctiveness in labels or "dress" of a product, presupposes ignorance or carelessness on the part of the ultimate purchaser. Trademarks were no doubt originated centuries ago, because purchasers could not or would not read.

The simulation of a trademark, label or "dress" of package which is calculated to deceive the most ignorant or unwary purchaser constitutes an unlawful invasion of another's property right in his good will.

(c) *What Is an Ordinary or Careless Purchaser?*

It is, however, apparent that a purchaser of automobiles will probably be an entirely different individual from the purchaser of chewing gum, tobacco or beer. The degree of intelligence and care which the purchaser of a Packard automobile exercises in the purchase of an automobile is different from the ordinary intelligence of the consumer of beer who purchases a bottle of that refreshment over the counter. One article costs four thousand dollars; the other fifteen cents. The former is purchased with deliberation; the latter is usually purchased over the counter in a most casual manner.

Judge Parker uses this language in the case of *Liggett etc. vs. Hynes,* 20 Fed. 883:

> "The difference in trademarks of the plaintiff and defendant, in this case, would perhaps be at once detected by the intelligent user of tobacco, looking for a favorite brand, just as a man of luxurious taste would discern his favorite brand of champagne. But the plaintiff is entitled to protection, as the trademark of the defendant would deceive the ordinary purchaser purchasing as such persons ordinarily do. In this we must not lose sight of the character of the article, the use to which it is put, the kind of people who ask for it and the manner in which they usually order it."

and again, in *Fairbanks vs. Bell,* 23 C. C. A. 554; 77 Fed. 869, Judge Lacombe has this to say:

"Necessarily, in applying the test suggested, viz: the likelihood of deception of an 'Ordinary purchaser exercising ordinary care,' regard must be had to the *class* of persons who purchase the particular article for consumption, and to the circumstances ordinarily attending their purchase. * * *

There is no confusion possible in the names of the articles, and defendant has inscribed its own name, 'Buffalo Soap Powder,' in bold letters, easy to read. The judge who heard the cause in circuit court was strong in the conviction that there was not a similarity calculated to mislead or deceive any buyer of ordinary prudence, that there was no danger of imposition upon any except idiots, and that people who have eyes, ears and common sense could not be beguiled by any similarity between the packages.

We are unable to reach the same conclusion. When it is borne in mind that articles of this kind, when once they are generally known, become associated in the public mind with the general appearance of the packages which contain them—with the *dress,* rather than the *name*—and that the ordinary retail purchaser of soap powder for consumption is *not usually of a high degree of intelligence, and has never had the experience of an EQUITY JUDGE in analyzing the elements which make up the general appearance of a package, it is quite conceivable that a dishonest dealer who kept complainant's and defendant's packages mingled together on the same shelves, some exhibiting the front panels and others the side panels to view, might easily palm off the one for the other upon an unsuspecting purchaser exercising the ordinary care* WHICH IS TO BE EXPECTED OF BUYERS OF SOAP POWDER FOR CONSUMPTION."

In the case of *Simmons vs. Simmons,* 81 Fed. 163, in considering a trademark applied to medicine sold to persons in the Mississippi Valley who were mostly unable to read and write, the court said:

"I have no hesitancy in saying that the facts clearly establish that the medicine constituted an unfair and ungenerous competition; that they were so dressed by him with the intent to deceive the public and lead *at least the*

> *ignorant class of persons,* who constituted the largest percentage of them in the localities in which defendant compounds and sells his medicines almost exclusively, to believe that they were purchasing complainant's medicines, which have been established for over fifty years and have become well and favorably known to the public."

As to the character of the article, in this case we are concerned with a beverage sold in bottles. The bottles are of a dark amber or brown glass and have pasted upon them a label of brown body color with white lettering thereon and a blue figure at the left-hand side. There are an infinite variety of labels used in marking beer in bottles, but no manufacturer of beer, so far as the record discloses, uses a brown label upon a brown bottle except the petitioner, and the defendant using the labels complained against in this suit.

In numerous cases the class of purchasers are mentioned. In *Wrigley vs. Grove,* 183 Fed. 99, the court says:

> "It is well known that the gum chewing community is not, as a class, drawn from the most intelligent and discerning portion of the public. The proof shows that in the city of New York the majority of customers come from the east side and is largely composed of ignorant foreigners, many of them unable to speak our language. That such customers may be induced to purchase the defendant's for the complainant's is more than probable."

The manner in which the article is sold has also been the subject of much discussion in the courts. In *Moxie vs. Daoust,* 206 Fed. 431, the court points out that the beverage was usually served to the customer in a glass filled from the bottle held in the dealer's hand, a method frequently used in dispensing the beverage sold by petitioner and respondent.

In a leading English case Lord Morris remarked:

> "People who ask for soda water at a restaurant, or call for soda and whiskey over the counter, do not, at any rate as a rule, handle the bottle or examine the label."
> *Cochrane vs. McNish,* 13 P. C. 100.

and in *Fischer vs. Blank*, 138 N. Y. 248, the court shows that the purchasers of the article in that suit were for the most part foreigners, many of whom were illiterate and could not read; that it was sold in many cases in dark shops and cellars where there was not sufficient light to enable persons to distinguish the packages which bore a general resemblance to one another.

In the Circuit Court of Appeals for the Ninth Circuit, in a case involving the sale of beer in bottles, as this, it is said:

> "A consumer who has been accustomed to purchase an article or a dress or a package which has become familiar to him does not stop to read and examine. Many of the consumers of beer are unable to read, and many are foreigners and unacquainted with the English language. All consumers, whether able to read or not, are in fact guided by the general appearance of the package or label which is before them."
>
> *Kostering vs. Seattle etc.*, 116 Fed. 620.

II.

GOOD WILL OF PETITIONER.

Extent of Good Will.

In 1893 the Joseph Schlitz Brewing Company received a grand prize at the World's Exposition for purity of its beer. In 1894 it adopted a brown label, a startling innovation, to distinguish its beer. This brown label has been continuously used since that time. The celebrity of "Schlitz" beer when respondent adopted its brown label in 1913 is best attested by the enormous sales. Nearly three hundred fifty million (350,000,000) bottles were sold in the six years preceding 1913. Ninety per cent of these were "Export" beer. The consumers of this beer, the customers of "Schlitz," were located everywhere. In Texas

nearly fifty million (50,000,000) bottles were sold during the same period through upwards of fifty agents in every section of the state.

Great pains have been taken to make "Schlitz" beer of the highest quality. Two million one hundred thousand dollars ($2,100,000.00) were spent in ten years in advertising, signs, plaques, billboards and specialties. In much of the advertising the brown bottles and the brown label separately and together were kept before the public. The brown label was pasted on every bottle of "Export" beer marketed as the distinguished mark of the petitioner. This brown label was the feature of petitioner's dress of package selected to maintain its good will. It identified the petitioner's bottle of "Export" beer to the beer consuming public. It was the means of extending petitioner's good will.

Who Are the Customers of the Schlitz Brewing Company?

The nature and extent of the custom of the petitioner is a subject which requires but little comment. The facts are not in dispute. Schlitz beer in brown bottles and bearing the brown label described in and attached to the Bill of Complaint, is sold in almost every civilized and semi-civilized country. It is sold in the antipodes, in China, India, Siberia, Australia; in New Zealand, Japan and other islands of the seas. It enjoys a ready market in South America and in the Central States; in Costa Rica, Honduras, Spanish Honduras, Nicaragua, Panama; in Mexico, as well as Cuba and Porto Rico.

These facts distinguish the instant case from many which have been decided by other courts. The trademarks and indicia —the good will—here involved have more than a local significance and value. The purchasing public of Schlitz beer is not merely the purchasing public of Texas. It also includes the purchasing public of Mexico and other countries as well. The

"unwary purchaser" whose possible deception the court is bound to consider in determining whether petitioner's good will is likely to be invaded is not only the unwary or ignorant Spaniard or Mexican in Brownsville, Texas, but also in Mexico, where respondents marketed their beer in competition with petitioner.

The testimony offered by the petitioner and the exhibits offered in court show that the simulation of the petitioner's dress has been frequent in foreign countries where the English language is not spoken; that several of the simulations in this country were used only in foreign trade.

Judge Chatfield of the New York Federal Court, in the case of *Schlitz Brewing Company vs. Interboro Brewing Company,* in rendering his decision on the motion for a preliminary injunction, used the following language:

> "These labels follow similar lines of arrangement and design as well as appearance, so that misconception could be computed to the defendant in further use of the label, and, as well, confusion might result in *export trade.*"

(The defendant in this case, a Brooklyn brewery, had not used the label complained of in export trade, but had used it only in marketing its beer in Florida.) Petitioner's Exhibit 17.

A further presentation of the differing character of the customers of the Joseph Schlitz Brewing Company is not necessary. The facts appear in the testimony taken. The court knows, as a matter of common knowledge, the different classes of people who purchase beer in Texas and in Mexico. The court knows that some are careless and unobservant; that some neither read nor write; that some do not speak the English language.

Character of Petitioner's Product.

The court will take judicial notice of the fact that the article in this case is not of large proportions like a locomotive, an

automobile or a yacht, in the purchase of which there would be a large degree of deliberation; nor is it like a package of breakfast food or a bottle of medicine, or a box of crackers which is taken home and consumed with more or less deliberation and lasts for a considerable period of time. It is a beverage dispensed in large quantities in bar-rooms in the various localities where Schlitz beer is sold, and consumed in the premises. The bottle, upon which the marks and other indicia of the petitioner are exhibited, is returned to the retailer and no opportunity for deliberation and little opportunity to examine the label is afforded the customer, and if deception has been complete, as we believe in this case, no evidence is obtainable unless the perpetrator of the fraud suffers a change of heart and confesses, a rare and improbable contingence.

How Is Schlitz Beer Sold?

The court should consider the manner in and the conditions under which Schlitz beer is sold.

With few exceptions, the decisions of the federal courts of this country, determining controversies relating to trademark rights or unfair competition, involve the simulation of a mark or package employed in the marketing of goods for *home consumption.*

The customer who calls for Gold Dust (Fairbanks case, supra) takes the article delivered to the home. The customer who calls for Sapolio or a certain kind of breakfast food, bluing, matches, coffee, tea, hooks and eyes, pills or toilet water, takes the article delivered to the home. The package remains there and its contents are gradually consumed. Although the article may have been purchased while "acting upon the moment," the customer is thereafter afforded an opportunity to discover any fraud which may have been perpetrated.

Beer and other beverages, however, are as a rule not taken to the home, when purchased, but are *consumed on the spot.*

A consumer of bottled beer, entering a bar, is usually with friends or meets friends. The refreshments ordered, including his beer, are served. He is engaged in conversation. He glances at the bottle before him. His eyes see a familiar picture; the blue, red and yellow border on white of "Budweiser" or the brown label and white lettering of "Schlitz." The conversation continues. He does not put the bottle in his pocket. He drinks his beer and leaves. He did not stop to study and reflect. He did not stop to read. "He acted on the moment."

As Lord Morris, in *Cochrane vs. MacNish,* supra, remarked:

> "People who ask for soda water at a restaurant or call for soda and whiskey over the counter, do not, at any rate as a rule, handle the bottle or *examine the label.*"

III.

PETITIONER'S MARK AND DRESS.

The petitioner was the first to use the characteristic combination of features which go to make up its trademark label.

The petitioner has used the brown or dark amber glass bottle for upwards of thirty (30) years.

The petitioner was the first to adopt and use upon its beer in bottles a label having a solid body color *other than white,* the natural color of the paper upon which the label is printed.

The petitioner was the first to use upon beer in brown or dark amber glass bottles, the light brown body colored label.

Mr. Kronshage, whose firm attended to the original registration of the label, and Mr. Bielfeld, manager of the bottling department of the petitioner, both testify that at the time of the adoption of this label with its characteristic features and solid body color, extensive research and investigations were made to insure to the petitioner upon the adoption of this label, an unusual, characteristic and distinctive mark and badge of

origin for the product of the petitioner bottled at the brewery.

Mr. Bielfeld testified that there was much comment on the type of label adopted by the petitioner and that some of its customers derisively referred to the label as a bay rum label.

So far as the petitioner was able to learn at the time, and so far as the evidence discloses, the petitioner did, in the adoption of its label, obtain an unusual, characteristic and original trademark label not then in use by any manufacturer of beer in bottles.

The trademark label of the petitioner originally adopted in 1894 is a parallelogram in solid body color brown and is pasted upon brown bottles containing petitioner's beer. It bears on the face white characteristic script and block lettering and the figure of a blue globe in distinctive arrangement. This trademark label has been exclusively used by petitioner in commerce between the several states and in foreign countries, including the states of Louisiana and Texas, and in Mexico, where the defendant has done business for upwards of twenty years. This label is used in two sizes and is shown in color, letterpress and insignia thereon in the printed transcript submitted herewith, Exhibit "A," on page (13) the quart bottle size, and Exhibit "B," page 21, the pint bottle size. It was originally adopted because of its unique features. Application for registration was made in February, 1895, in the United States Patent Office, and the label duly registered April 9, 1895, trademark No. 26385. Reference to the color of the background is made as follows:

> "The color and background of the trademark as used with the various brands of malt liquors varies, and aims to correspond with the color of the beverage so as to indicate at a glance the brand itself."

The rights under this registration were reasserted in the Patent Office at Washington, D. C., by the petitioner as late as July 16, 1912. (Trans. pp. 120, 137.) The particular light

brown body color upon the labels, Exhibit "A" and Exhibit "B" is the color used since the adoption of the label in 1894, upon all export beer in bottles put up and labeled by the petitioner at the brewery. Export beer is the brand customarily sold in commerce between the several states, including Louisiana and Texas, and in foreign countries, and the small size label, Exhibit "E," on pages 13, 21 and 121 of the Transcript, was the label used on the bottles contained in 817 car load and half car load shipments ordered by the respondent while agent of the petitioner, to be delivered to Texas and Louisiana points between the years 1902 and 1912.

The Essential Features of Petitioner's Marks, Collocation and Dress.

The essential features of the marks, collocation and dress of the product of the petitioner, bottled by itself, as offered for sale to the public and as declared in the Petitioner's Bill, are as follows:

1. A brown bottle.
2. A label rhomboidal in shape but almost square.
3. A label with a solid body color.
4. A label with the body color brown.
5. A label having a marginal line.
6. A label having a marginal line in white.
7. A label showing a globe, the general trademark of the petitioner, near the left margin.
8. A label showing the general trademark of the petitioner in the color blue, near the left margin.
9. A label showing the name of the beer (Schlitz) in heavy ornamental script.
10. A label showing the name of the beer (Schlitz) in heavy ornamental script in white.
11. A label showing the name of the beer (Schlitz) in heavy ornamental white script slanting upward from left to right.

12. A label showing the name of the beer (Schlitz) in heavy ornamental white script slanting upward from left to right with a paraph underneath.

13. A label showing the name of the beer (Schlitz) in heavy ornamental white script with paraph underneath in white.

14. A label showing the name of the beer (Schlitz) in heavy ornamental white script with paraph underneath shaded in blue.

15. A label showing other wording (The Beer That Made Milwaukee Famous) in plain block lettering underneath the name of the beer (Schlitz).

16. A label showing other wording (The Beer That Made Milwaukee Famous) in plain block letters in white underneath the name of the beer (Schlitz).

These constitute the essential features of the marks and collocation of the petitioner as well as the dress of its product as it is offered to the public when bottled by the petitioner. These are the essential features which go to make up the mental picture which in the public mind is associated with petitioner's product and which the public recognizes as badges of origin.

(c) *Color an Element in Trademarks and Dress of Package.*

Petitioner's counsel on the hearing of this case in the District Court and upon the argument in the Circuit Court of Appeals endeavored to enlighten the courts as to the exact position of the petitioner regarding the color of its label.

Counsel for the respondent charged that petitioner was asking for a monopoly of the color brown, to which petitioner's counsel answered that petitioner made no such claim to the color brown in and of itself, but did claim, and the record disclosed that the petitioner claimed, the brown colored label in *combination with the other elements which go to make up its trademark label.*

The rule for which counsel has uniformly contended is better stated than counsel can state it by Mr. Justice Holmes in the case of *New England N. E. Awl Co. vs. Marlborough,* 168 Mass. 154, cited by the Circuit Court of appeals on page 821 of its reported opinion:

> "Of course a person cannot claim the monopoly of a color in connection with a particular line of trade, and very likely not in connection with the labels of a certain kind of goods generally. *But the most universal element may be appropriated as a specific mark of a plaintiff's goods, if it is used and claimed only in connection with a sufficiently complex combination of other things.* The plaintiff did not claim the exclusive right to brown labels for awls, but it claimed the exclusive *use of the brown color in combination,* which we have described."

In this case the petitioner claims the brown label in combination with the other elements heretofore described, and particularly set forth in the complaint and uniformly alluded to in the testimony.

When the Circuit Court of Appeals eliminates the brown color from the label it bases its decision upon elements, which, aside from the color, have never been used by the petitioner to identify its goods.

As counsel for the petitioner understood the rule regarding color, it would have been unavailing for petitioner to have claimed an exclusive right to a particular color except the color "be impressed in a particular design as a circle, square, triangle, a cross or star," citing:

> "Color, except in connection with some definite, arbitrary design, such as when impressed upon a circle, star, cross or other figure, or employed in definite association with some characteristics which serve to distinguish the article as made or sold by a particular person, is not the subject of monopoly as a trademark."
>
> *Leschen Rope Co. vs. Broderick,* 201 U. S. 166, p. 171;
>
> or
>
> *Newcomer vs. Scriven,* 168 Fed. at p. 623.

No other manufacturer of beer in bottles had ever used a brown label in similitude to petitioner's label upon beer in brown bottles with the acquiescence or consent of the petitioner or its officers.

In at least one instance, "Exhibit G," the only points of similarity were the brown label with white lettering, Peterson's standard beer in similitude of the petitioner's label, and the use of the label objected to has been discontinued. Petitioner did not rely solely upon the shape or size of its label, but particularly objected to infringements by the simulation of the color of the background, color and style of letterpress and color of figure on the left hand side, that is, any combination which in general appearance suggested the exclusive brown label of the petitioner with its white letterpress and blue figure thereon.

If the Circuit Court of Appeals had followed the decisions applicable to the situation presented and adjudicated the trademark of the petitioner, adopted in 1894 and continuously thereafter used in commerce between the several states and in foreign countries, it could, we submit, have come to but one conclusion, that the petitioner was entitled to protection of its trademark, the color of which was its most essential element.

In support of this conclusion we respectfully direct the court's attention to the following cases: Mr. Justice Clifford, in *McLean vs. Fleming,* 96 U. S. 245, p. 255, says:

> "Mention may also be made of the fact that the color of the label and the wax impression on top of the box are well suited to divert the attention of the unsuspecting buyer from any critical examination of the prepared article."

At page 256 the court says:

> "Difference between those exhibits and Exhibits 'F' and 'H' of the complainant undoubtedly exist; and still it is manifest that the general appearance of the package in the respects mentioned, and others which might be sug-

gested, is well calculated to mislead and deceive the unwary and all others who purchase the article without opening the box and examining the label."

We direct the court's attention to the language of Mr. Justice Holmes in New England Awl Company case, quoted in the report of this case, 241 Fed. Rep. p. 821, and previously here referred to.

In *Anheuser-Busch Brewing Association vs. Clark,* 26 Fed. 410, complainant was the first to use for bottled beer a label with a diagonal red band extending *downward* from left to right, with the name of the kind of beer appearing in white letters upon the band, an injunction was granted though the labels were otherwise strikingly dissimilar.

In *G. Heilman Brewing Co. vs. Independent Brewing Co.,* 191 Fed. 489, the imitation of a conventional design in general color and arrangement of elements was enjoined.

And in *Kostering vs. Seattle Brewing Co.,* 116 Fed. 620, the court awarded an injunction upon the general appearance and dress of the package.

Other cases upon which the petitioner relied, and to which it cited the Circuit Court of Appeals, are *Fairbanks vs. Bell,* 77 Fed. 869, 23 C. C. A. 554. The picture of the package appears on page 559 of the C. C. A. reports. The court held that notwithstanding the distinctive features where the yellow color of the complainant's package was copied by the defendant, there was a manifest intent to simulate complainant's packages and an injunction should issue. The court in that case had this to say about the color:

"Color, undoubtedly, is a most important element in all package combinations; but there are other elements as well which go to make up the entire combination. * * * It would not be giving the complainant a monopoly of yellow to restrain the sale of a particular yellow package, where, in addition to the color, a number of other elements each differing more or less from its analogue in complainant's package had been so collocated together as to produce a

general appearance calculated to delude the unwary purchaser." 77 Fed. p. 876.

This is precisely what the respondent did in the present case and this was the contention of the petitioner's counsel on the argument of this case, and the theory upon which the case was tried from the commencement of the suit.

In *Ohio Baking Co. vs. National Biscuit Co.*, 127 Fed. p. 116, and in *National Biscuit Co. vs. Swick*, 121 Fed. 1007, the trademarks shown in reports were quite dissimilar, but printed upon bright red background, and the use of the mark was enjoined, on account of the color.

In *Gulden vs. Chance*, 182 Fed. 303, the labels printed in colors opposite page 303 in the report, the colors and shape of labels are similar, but the details of printed matter upon them are different, but the court awarded complainant relief, and so in the case of *Wrigley vs. Grove Co.*, 183 Fed. 99, the court awarded complainant relief where the color scheme of plaintiff's gum box was imitated, although the details of the labels were quite different.

Since this case was argued in the Circuit Court of Appeals, numerous other cases have been decided in which the color of a label or dress of the package have been the subject of consideration.

In *Helmet Co. vs. Wrigley, etc.*, 245 Fed. 824, (C. C. A. 6th Cir.), Circuit Judge Warrington says:

> "While there are different features of these packages, both in words and in colors, yet there is a striking similarity in their general appearance. * * * The degree of resemblance found here can receive but one interpretation; it required study and ingenuity to bring it about; it is calculated to confuse and deceive. One of the controlling reasons for this is to be found in the skillful association of colors employed by defendant on its counterbands and on the wrappers of the individual pieces of chewing gum, and particularly the use made of the pink."

In *Wm. Wrigley, Jr., Co. vs. Colker*, 245 Fed. 907 (E. Dist. Ky.), the court says:

> "Why does defendant select pink when he has all the other colors of the rainbow to make a selection from—blue and violet and yellow and green? But he takes the complainant's color. And so as to these other markings."

On the hearing of the motion for a preliminary injunction in this case, petitioner went to much trouble and expense to prepare a large number of labels, showing a variety of combinations in colors distinctive from the petitioner's combination, and all of them more harmonious with the brown color of the bottle. Notwithstanding the infinite number of combinations it might have adopted, respondent chose the one which it knew indicated to many the petitioner's product, and justified it on the grounds that the petitioner could have no monopoly on the color brown, and that the brown and white combination was more harmonious on the brown bottle.

We submit that when the respondent entered the field of selling beer in brown bottles, mindful of the rights of the petitioner to its distinctive dress of that color of package, he owed a duty to the petitioner to so distinguish his goods that the most humble purchaser of petitioner's beer would not be misled.

IV.

EXCLUSIVE USE.

(a) *Petitioner's exclusive use of its mark.*

In addition to the registration of its trademark label in the Patent Office of the United States, the petitioner has registered its trademark label in most of the countries of the world where its beer is sold and where trademark registrations are permitted.

Notwithstanding the fact that in many of the countries where petitioner's beer is sold the people do not speak the English language and therefore cannot readily distinguish or retain an exact picture of the petitioner's label because of inability to read the wording thereon, the petitioner has registered the mark and uses it in commerce with the exact wording and other features disclosed in and upon the bottle of petitioner's product filed in this suit and marked Exhibit "B." The petitioner has warned its dealers and other breweries to beware of infringements of its characteristic label. (Trans. p. 42.)

Mr. Bielfeld has identified a number of labels having a brown body color and other features which the petitioner considers infringements of its trademark label. In every instance that has come to the attention of the petitioner steps have been taken to prevent the use of these alleged infringing labels by other manufacturers and so far as the petitioner knows in every instance, with the exception of the case at bar which petitioner is now prosecuting, the use of the alleged infringing labels has been stopped either by agreement with the users thereof by appropriate legal steps taken to that end. (Trans. pp. 42, 43, 44.)

In all of the instances of alleged infringement referred to by Mr. Bielfeld in his testimony, the essential features only were simulated by the alleged infringers. In some of them only the color was the distinguishing feature and in all of them the wording upon the labels was different.

Many of the witnesses mention some seven brands of beer that are sold in the Texas market. Some of these brands are put up in black or in brown or dark amber glass bottles. None of them (with the exception of the newly adopted package of the respondents) bear a label which is similar to the petitioner's in color or any of the features of such label. (The use of another label in Texas to which we attempted to call the lower court's attention was enjoined during the trial of this case.) (Trans p. 64.)

Until the acts of the respondent herein complained of, the petitioner was in the exclusive enjoyment in Texas and vicinity of its original and characteristic label and of the color of the letterpress and general appearance of its dress and package hereinbefore described. And, so far as the petitioner knows, it is in the exclusive enjoyment of its trademark label and all of the characteristic and distinguishing features and collocation of elements which go to make up its peculiar and distinctive dress of package, everywhere in the United States and in foreign countries where its product is sold. (Trans. p. 44.)

(b) *Publicity given to the Marks and "Dress" of Petitioner.*

Generally speaking, the brown label of the petitioner has appeared upon each of three hundred fifty million brown glass bottles of its product which were distributed over the United States and in foreign countries. During the years 1900 and 1912, upwards of Two Million One Hundred Thousand Dollars ($2,100,000.00) was expended for advertising in newspapers, by means of signs and show cards, by magazines and printed matter. Plaques with fac simile pictures of the brown label in colors and pictures in colors of the bottle with the brown label thereon, were distributed to the various representatives of the company throughout the world where its beer is sold. In addition to the newspaper and magazine advertising, posters were displayed throughout different towns in Texas. Millions of letterheads, billheads and envelopes each containing a fac simile of the label in miniature were furnished to all of the representatives of the company for their use. (Trans. pp. 46, 47, 54 to 57.)

In the state of Texas the beer of petitioner bottled in brown or dark amber glass bottles bearing the characteristic label of the petitioner, set up in this cause, has been distributed and consumed by the public for upwards of twenty (20) years.

During the six years between 1906 and 1912, upwards of

fifty million bottles of petitioner's product in brown or dark amber glass bottles bearing this distinctive label of light brown body color and with the other features and insignia thereon were consumed in the state of Texas. (Trans. p. 45.)

In much of its advertising petitioner has displayed its label and bottle in colors to the public. (Trans. p. 47.)

Evidence was adduced on the trial of the use of posters in colors containing such label and package, of miniature fac similes, in colors, of the label upon letterheads, billheads, statement heads and envelopes, used not only by the petitioner in its correspondence and business dealings, but by its agents and representatives everywhere, including the state of Texas; and also of the plaques and signs on metal and glass souvenirs, pictures and pamphlets containing this label or package in colors. (Trans. p. 52.)

So that the petitioner in addition to manufacturing a superior product, the best it can produce by the aid of distinguished fermentologists and the general advertising of its product to the public has in many ways kept before the public its original and characteristic trademark-label and the picture in colors of its bottle and the label thereon. So that in addition to the consumers of its product millions in number, the public generally are acquainted with the general appearance in coloring, letterpress and insignia of the petitioner's label and its distinctive and characteristic dress of package.

(c) *For twenty years petitioner has used for its bottled "Export" beer a package exemplified by "Exhibit B," to the exclusion of the world.*

"Secondary meaning" is a term which the courts of this country have hesitated to define. When does the color or any other distinctive feature of the "dress" of a package acquire a "secondary" meaning?

A study of the cases cited in the brief or the argument

discloses that the term has been applied to a "word" which had come to identify a certain product, and also to features of a patented article, the patent on which has run out where they are nonfunctional and have come to identify the product of the original manufacturer.

It is quite customary with the traveling public to order "Worcestershire Sauce" with fish. What kind of a sauce does the public expect to get? How does the public recognize the sauce it calls for? We venture to say that anyone venturing to order "Worcestershire Sauce" expects to be served with a sauce made by Lea & Perrins of England. Can any member of this court, on the first reading of this brief, say what is contained on the label of Lea & Perrins sauce? It is well known that this particular sauce carries a red label. It is not known as the red label sauce, but who can describe or state what appears by the way of letterpress on this label?

Probably the most famous and generally purchased catsup on the market is manufactured and sold by Curtis Brothers of New York. Possibly the members of this court are not familiar with the Curtis' catsup, but a blue label is its mark of identification. It is not known as "Blue Label Catsup," but customers rely on the color of the label.

Kingsford's Corn Starch is now manufactured by the Standard Oil Company. How do housewives recognize the package? That is, your wife and my wife; your child or my child; your maid or my maid? Do they accept a package of cornstarch as and for Kingsford's because the package is in a yellow wrapper, or do they stop to examine and read the label?

Is Palm Olive usually purchased by persons who carefully examine and read the label, or by persons who accept the olive green wrapper as the mark and sign of the real product? Is Gold Dust Washing Powder or Dutch Cleanser purchased by the maids and charwomen after a careful examination and reading of the letterpress appearing on the package or the color and general appearance of the package? Does the purchaser of

the French champagne "Veuv Cliquot" carefully read the letter-press of the yellow label?

Probably no one is more particular than an Englishman who drinks ale. He will order "White Label Bass" bottled by McMullen of New York. or "Red Label Bass," bottled by Burke of Liverpool; or "Dog's Head Bass," bottled by Reed Brothers of London. All of these are various bottlers of Bass Ale.

The Schlitz Brewing Company has been bottling its own beer for over twenty years. For twenty years its product destined for interstate and international trade has been put up in a brown bottle bearing a brown label. No individual bottler has been permitted to put his individual stamp on the bottled product of the petitioner. It has always sold under its own colors. The petitioner's beer is known as Schlitz to the consuming public, although it is identified by a brown label. A beer in a brown bottle bearing a brown label to the consuming public means "Schlitz." "Schlitz" is the brown label beer,

The use of a brown label on a brown bottle for a period of twenty years to the exclusion of the world has made "Schlitz" beer the brown label beer.

V.

GOOD WILL OF RESPONDENTS.

(a) *The Magnolia Brewery.*

The Houston Ice & Brewing Company Brewery has since the organization of the corporation in 1902 been known as the Magnolia Brewery. When it was organized in 1902 it purchased the Magnolia Brewery and all of the assets from the trustee of the former Houston Ice & Brewing Company. It has been known from the beginning as the Magnolia Brewery, properly known as such. The corporate name is not known by many persons now. (Trans. pp. 108, 112.)

The respondents sometime in 1894 put upon the market a beer bottled in clear glass bottles bearing a white label, upon which was imprinted an alleged trademark about the center of the label, the distinctive feature of which was a red annular ring. The word "Southern Select" and the name of the brewing company were in ordinary script and other indicia appeared on the label.

The name "Southern Select" was the principal name under which the company bottled its beer and the white label is still used, approximately fifteen per cent of the bottled beer of the brewery having been put up in the light bottles during the year preceding the trial.

(c) *The Magnolia Brewery's Other Labels.*

McAutrey, secretary of the respondent company, testified to the use by the brewery of a "Magnolia Pale" label, "Reputation" label, "Milwaukee Exquisite" and a number of near beers which were put out under the near beer labels. All of these other labels had been abandoned and a considerable quantity of the respondent's product put up in bottles was sold without any label at all. The "Milwaukee Exquisite" label was abandoned because the company believed a law had been enacted prohibiting the use of geographical names in that manner. (Trans. p. 112.)

VI.

RESPONDENTS, COMPETITORS AND FORMER AGENTS OF PETITIONER, ADOPT AND USE A NEW LABEL AND "DRESS" OF PACKAGE FOR BOTTLED BEER.

(a) *The "Magnolia" Brewery's knowledge of petitioner's marks, label and "Dress" and the extent of petitioner's*

good will, particularly in the States of Texas and Louisiana.

There is no dispute of the fact that the respondents were acquainted with the petitioner's label and dress of package.

From the year 1900 to the year 1912 Houston Ice & Brewing Company was a distributor of petitioner's product bottled in brown or dark amber glass bottles with the distinctive and characteristic brown label thereon.

(b) *Respondent's Duty Toward the Petitioner.*

In connection with the trademark and label cases and cases where the "dress" of a petitioner was simulated, in many instances the duty of the defendant to distinguish his goods was commented upon. Indeed, in all the cases where relief was denied, it was denied on the conclusion of the court that the label or "dress" had some distinctive characteristic so that the customers of the petitioner would not be misled. The duty to distinguish had been performed.

Of recent years the courts have been more willing to specify and require the defendants by express provisions in the decree, to distinguish their goods when they come into the field previously occupied by a competitor. The duty to distinguish is now a fixed principle of trademark and unfair competition law.

The rule as thus developed has recently been very succinctly stated in the case of *Moline Plow Co. vs. Omaha Iron Store Co.*, 235 Fed. 519.

This rule is repeated in our Brief of the Argument under this title, and the cases through which the duty of the defendant in that behalf has been developed by the courts, are cited

(c) *The Essential Features of Defendant's Marks, Collocation and "Dress."*

We direct the court's attention to the labels adopted by the respondent about the year 1913, after it ceased to represent the petitioner as a distributor of its product. Although we appreciate that a description of the respondent's label may be unnecessary, we desire to present to the Court the essential features of the marks, collocation and dress in which the defendant offers for sale to the public a part of its product bearing the labels complained of by the petitioner, arranged in an equal number of paragraphs with the description of the petitioner's collocation and dress. The simulations are in italics. These are as follows:

1. *A brown bottle.*
2. A label square in shape.
3. *A label with a solid body color.*
4. *A label with the body color brown.*
5. *A label having a marginal line.*
6. *A label having a marginal line in white.*
7. *A label showing a circular figure,* the general trademark of the respondent, *near the left margin.*
8. *A label showing the general trademark* of the respondent, with annular ring *in the color blue, near the left margin.*
9. *A label showing the name of the beer* (Southern Select) *in heavy ornamental script.*
10. *A label showing the name of the beer* (Southern Select) *in heavy ornamental script on white.*
11. *A label showing the name of the beer* (Southern Select) *in heavy ornamental white script slanting upward from left to right.*
12. *A label showing the name of the beer* (Southern Select) *in heavy ornamental white script, slanting upward from left to right with a paraph underneath.*
13. *A label showing the name of the beer* (Southern Select) *in heavy ornamental white script with the paraph beneath, in white.*
14. *A label showing the name of the beer* (Southern Select) *in heavy ornamental white script with the paraph underneath, shaded in blue.*
15. *A label showing the other wording* (Houston Ice & Brewing Company) *in plain block lettering underneath the name of the beer* (Southern Select).

16. *A label showing other wording* (Houston Ice & Brewing Company) *in plain block letters in white underneath the name of the beer* (Southern Select).

Every essential feature of the petitioner's mark and dress of the package is simulated by the respondent in the use of these labels.

There are slight differences in only four minor particulars. First: The petitioner's label is rhomboidal in shape but almost square, whereas the respondent's is square. Second: The respondent's label upon pint bottles is somewhat larger than the label used by the petitioner upon pint bottles. Third: There are differences in the design of the circular trademark, although respondent has adopted a blue annular ring instead of a red one used by it for many years prior to the change in the label. Fourth: The wording appearing in small letterpress is different.

The color, the letterpress, the arrangement of lettering and indicia upon both labels are identical.

There is no distinguishing feature between the respondent's and petitioner's label in color, arrangement or letterpress which would attract the attention of an "unwary" or careful purchaser of beer in bottles.

In the adjudicated cases arising because of alleged simulation where injunctions were refused, the courts acted upon the showing that the differences were so gross, or there were added to the label or dress such distinguishing features or characteristics that confusion was impossible and substitution could only be made by trick or artifice of the retailer.

For example, in the case of *Lorillard vs. Peper,* 86 Fed. 956; 30 C. C. A. 496, the coloring of the letters was different and there was a marked difference in the coloring of the package and the shape of the type.

In *Postum Cereal Co. vs. American H. F. Co.,* 119 Fed. 848; 56 C. C. A. 360, the defendant's package bore the distinguishing feature of a large red heart which was not present upon the package of the complainant.

That except for these unusual distinguishing features, the results in the cases cited would have been different, is evidenced by the language of Justice Brewer in the *Lorillard case,* supra, in which he says:

> "In determining the question of fradulent imitation of packages and labels merely noting the points of difference or similarity is not sufficient, the package must be considered as a whole."

As to a particular mark or "dress" which by being used in connection with articles of trade of its manufacture has acquired an understood reference to the originator or manufacturer of those articles, the first appropriator has the right to protection against persons who simulate *the general features* of such mark or "dress."

Courts of equity have so uniformly held that a manufacturer will be protected in *the general appearance* of his original and exclusive mark or dress of package (regardless of the wording or differences upon the infringing label, if there are marked similarities) that we felt and still feel that petitioner was entitled to an injunction merely upon the inspection of the two packages bearing these two labels.

VII.

THE NEW LABEL AND "DRESS" USED BY RESPONDENT ON A BRAND OF BOTTLE BEER UNLAWFULLY INVADES PETITIONER'S PROPERTY RIGHT AND IS A FRAUD UPON THE PUBLIC.

The Intent to Commit Fraud.

The resemblances between petitioner's and respondent's marks and "dress" are not fortuitous and the court will assume that they are the result of deliberate design.

The questions which confront this court at the very threshold of a consideration of this case are:

"Why did the defendant adopt a label for its bottled lager beer which in so many respects resembles the label and trademark of the petitioner?" "Why did the defendant select one certain collocation of design, lettering, color and general arrangement, out of numberless possible collocations, which should so nearly resemble the general appearance of the collocation of the petitioner?"

The respondent was at one time agent of the petitioner, and between 1900 and 1912, both inclusive, sold upwards of twelve million (12,000,000) bottles of petitioner's beer. It knows the beer trade in Houston and the state of Texas. It is familiar with the popularity and of the prestige enjoyed by different beers marketed in its immediate environment, and the value which attaches to the trademarks and other indicia employed for the purpose of designating the origin and ownership of Schlitz beer and the various other beers so marketed.

"When a defendant so circumstanced and having such specific and peculiar knowledge of the trade in the commodity which it manufactures, adopts a dress for its goods which in many of its salient features resembles the dress employed upon the similar product of some well known manufacturer, the court will say that such resemblance is not fortuitous, but that it is intentional; that such resemblance is for the purpose of pirating upon the trade of the other manufacturer and for the purpose of inducing the unwary and careless purchaser to buy goods of his manufacture, believing them to be the manufacture of the other. *That the defendant resorts to such a fraudulent design is the best evidence of successful deception. Fairbanks Co. vs. Bell,* supra.

As Judge Lurton well said in *Paris Medicine Co. vs. Hill,* 102 Fed. 148, 151:

> "When there are found strong resemblances, the natural inquiry for the court, why do they exist? If no suffi-

cient answer appears, the inference is that they exist for the purpose of misleading."

See also *Taylor vs. Taylor, 23 Law Journal,* Ch. 255, to the same effect, and *Hiram Walker & Sons Co. vs. Hockstaeder, et al.,* 85 Fed. 776. In *Cauffmann vs. Schuler,* 123 Fed. 205, the court says:

> "It is not necessary that the resemblance should be such as would deceive first or intelligent purchasers. It is sufficient if it is calculated to deceive the unwary and incautious or the ignorant purchaser. * * * It is true that there are differences in the labels, such as substitution of the words 'Imperial' for 'Cauffmann,' the omission of the words 'Celebrated' and other differences, such as the wording of the 'caution' and the name subscribed thereto. It is not, however, the dissimilarities which are the test, but the resemblances. * * * *I am unable to account for the numerous resemblances referred to, except as the result of design. There could be but one motive for dressing defendant's goods in a garb so nearly like complainant's, and that was to acquire a part of the trade which the complainant had built up for his goods, and engage in a competition in trade, which the courts of equity hold to be unfair."*
>
> Preliminary injunction granted.

Mr. Justice Farwell, in *Chivers vs. Chivers,* 17 R. P. C. 420, 427, says:

> *"It does not lie in the mouth of a rogue, when he is found to be a rogue as a fact, to say that his roguery was so clumsy that it could not possibly succeed."*

(2) *Abandonment of Old Name, Dress or Mark and the adoption of a new one similar to Petitioner's is Fraud.*

The Houston Ice & Brewing Company's brewery has, since the organization of the corporation in 1902, been known as the "Magnolia Brewery."

Some time in 1894 it put upon the market a beer bottled in white bottle bearing a white label, upon which was imprinted

an alleged trademark, the distinctive features of which was a red annular ring, and the words "Southern Select" in ordinary, Spencerian script, and other indicia.

In 1913, after the respondent's relations as distributing agent for the petitioner had been severed, it put upon the market beer bottled in brown bottles, bearing a brown body colored label, upon which there is imprinted an alleged trademark, the most characteristic feature of which is the color blue, and words printed in white ornamental script and other indicia.

In *Fairbanks vs. Bell,* 23 C. C. A. 554; 77 Fed. 869, Judge LaCombe says:

> "It may fairly be assumed that the individual who designed defendant's yellow and black package was an expert, familiar with the trade; that the changes he made in the *old package* were all in the direction of complainant's package is manifest; that he was intelligent enough to make such changes in order to accomplish a definite object will surely not be disputed; and that such object was the production of a package resembling complainant's is the irresistible inference. * * *
>
> "We are not left to inferences, however, to determine whether that purpose has been accomplished. In many cases, where simulation is plain, injunctions have been issued without proof of specific instances of deception."

In a recent case, *Helmet vs. Wrigley,* 245 U. S. 824, before the Circuit Court of Appeals for the Sixth Circuit, Warrington, Circuit Judge, says:

> "While there are different features of these packages, both in words and colors, yet there is a most striking similarity in their general appearance. Complainant's product, it is true, can be distinguished from defendant's product when the packages are examined together for the purposes of comparison; this can be done too when they are examined separately by one who is familiar with the two sets of packages, since he can do so through the presence or absence alone of Wrigley's name; but the identity is so marked that the average user desiring the product of either producer would in all likelihood be misled into buying the product of the other. The likelihood of confounding de-

fendant's brands with complainant's brand would naturally occur in respect of an inexpensive article such as chewing gum. Any tendency to confuse users ought to suggest to manufacturers and dealers avoidance of similarity, rather than its cultivation. The degree of resemblance found here can receive but one interpretation; it required ingenuity and study to bring it about; it is calculated to confuse and deceive. One of the controlling reasons for this is to be found in the skillful association of colors employed by defendant on its counterbands and on the wrappers of the individual pieces of chewing gum, and particularly (except as to one) the use made of the pink. The only answer that the president of defendant company could give to the question why it was necessary to 'adopt a pink wrapper for each individual stick' was:

> 'Because pink poster paper is the cheapest paper for printing. Some of the high priced goods have white and some pink, but pink is the cheapest paper.' "

In an opinion rendered in *Wm. Wrigley, Jr., Co. vs. Colker,* 245 Fed. 907, as appears by an exhibit here, Judge Cochran said:

> "The defendant has the right to use spearmint to flavor his gum, and to sell it. But why not wrap it in a blue package? I have an idea that if you would put it up in a blue package, the complainant would not complain. Why does he select pink, when he has got all the other colors of the rainbow to make his selection from—blue and violet and yellow and green? But he takes the complainant's color. And so as to these other markings. Wrigley has his lettered in red and so is Colker's lettered in red. Other markings are in green on Wrigley's product, and so is Colker's in green, and it is that way all around, it is in the same colors exactly. There is no other conclusion that one can come to, than that he adopted that dress in order to get Wrigley's business."

As Judge Lacombe said in *Lalance & Grosjean Mfg. Co. vs. National Enameling & Stamping Co.* (C. C.) 109 Fed. 317, 318:

> "It is no doubt true that no one can have a trademark monopoly in color of paper, or in shape of label, or in color of ink, or in one or another detail; but a general collocation of such details will be protected."

Helmet Co. vs. Wm. Wrigley, Jr., Co., 245 Fed. 824.

The many exhibits before the court show that it is easy to avoid simulation.

The only explanation given by respondent was that the color harmonized with the brown bottle. We can only come to the irresistible conclusion that Judges Lacombe and Warrington came to in the foregoing parallel cases, the object was the production of a package resembling petitioner's. We submit under all the circumstances this is the only possible inference.

(a) *Agents and representatives employed respondent's new label and package as an inducement to commit fraud.*

The most striking evidence of the natural and probable result of respondent's adoption of the brown label upon beer in brown glass bottles is found in the conduct and statements of the agents and representatives of respondents who attempted to sell and did sell to the customers of the petitioner the product of the respondent.

The naive explanation of Craeger, who was an agent of respondent (Trans. 106, 80) (copied in this brief p. 8), is convincing evidence, not only of the fact that the probable result of the use of the brown label upon a brown bottle would be an unlawful invasion of petitioner's good will, maintained and extended by the use of a brown trademark label but also of the fact, that by the adoption of a brown label in connection with the sale of beer in a brown bottle, the respondents deliberately intended to steal as much of petitioner's good will as possible by deceiving petitioner's ultimate consumers; and to place in the hands of the retail dealer an instrument of fraud.

These are the facts. Craeger's argument appealed to Tomlinson. Tomlinson bought defendant's product, and he says that the similarity between the packages was so great that his clerk (white) confused the packages on a number of occasions

and served the "Magnolia" Brewery's "Southern Select" beer for Schlitz, although he had been warned to be careful not to do so.

But that is not all of the evidence. Craeger was the only traveling representative of the respondent who was called by respondents to testify at the trial. Another representative, DeVillier, it was said, was dead. But two others, Jesse Perez of Mission, Texas, and Harlan of Beaumont, were still living.

Two witnesses testified of the activities of DeVillier. Blum of Temple, Texas, said DeVillier told him:

> "If you had tried to sell our beer instead of Schlitz you might have made lots of money. * * * Q. He said their new bottled beer put up in brown bottles and bearing their brown label could be sold for Schlitz?
> A. Yes, sir." (Trans. pp. 58, 59.)

Peter Breit of Pharr and Dana, Texas (near Mission), said DeVillier and Jesse Perez had told him practically the same thing and admitted that he had actually accomplished the passing off and substitution of respondent's beer so marked as and for the beer of the petitioner. (Trans. p. 88.)

Perez conducted respondent's cold storage plant at Mission.

Harlan was the representative of the respondent company at Beaumont, Texas. The witness Fischer testified that Harlan had induced him to buy the "Magnolia" Brewery's "Southern Select" beer in brown bottles with a brown label, on the representation that it could be sold as and for Schlitz beer; and that he sold it "right along for such." (Trans. p. 76.)

Some one has said that fraud is only committed "in the dark, obscure alleyways of human depravity." Another, that actual proof of an intent to defraud is impossible except by confession; that intent is a "matter of mind," a "matter of thought," a "condition of thought," and "usually must be inferred or implied by the court."

In *Von Mumm vs. Frash, supra,* the court says:

> "It is not likely that the knave who perpetrates the fraud * * * will disclose himself to the complainant; and the ultimate consumer, if cognizant of the fraud practiced upon him, could not, unless by mere accident, be known to the complainant."

How many times Craeger, DeVillier and Perez made representations that the "Magnolia" Brewery's beer in brown bottles with brown labels could be sold for Schlitz petitioner does not know and will not know; nor does it know or will it know the names of its retail customers who responded to this appeal to defraud. The undisputed evidence of the instances appearing in the record are, however, most convincing that the activities of the representatives of the respondents cover the entire state of Texas and that these representatives secured the active assistance of many retailers, induced by an *additional profit of $2 per cask* in their own and their principal's endeavor to have the product of the "Magnolia" Brewery palmed off and substituted for Schlitz beer.

(b) *Respondent's new label and "dress" of package may possibly deceive the careless or illiterate purchaser and thereby invade petitioner's good will; will probably deceive the careless or illiterate purchaser and thereby invade petitioner's good will. As a matter of fact, respondent's new label and "dress" not only deceives customers of the petitioner but causes confusion in the retail trade.*

THERE NEED BE NO EVIDENCE OF ACTUAL DECEPTION.

Petitioner is entitled to the relief prayed for without proof of actual deception.

Why did respondent adopt the label and package complained of when its brewery is known as the "Magnolia" Brewery, and its beer known as "Magnolia Beer?" After its business rela-

tions with the petitioner severed, why did it adopt a package so cleverly simulating the petitioner's in all its salient features?

However, the vital question for this court to decide is whether the careless and ignorant purchaser of Schlitz beer, be he of Texas or of Mexico, might be deceived into purchasing the beer of the respondent as and for the beer of the Schlitz Brwing Company. Being mindful of the character and class of persons purchasing bottled beer and the circumstances under which such bottled beer is sold, *can this court of conscience say that there is no probability or possibility of confusion?*

Courts, generally, do not require evidence of actual deception. They decide cases similar to the instant case after an inspection of the trademarks, labels and other indicia. This rule of equity has been previously referred to in this brief. The manifest improbability of producing evidence of actual deception is the reason for the rule. In the case before this court the very nature of the business and the manner of selling beer in bottles makes the production of evidence of actual deception of consumer almost impossible. If deception is complete, the consumer is not aware of it. The instrument of fraud, the peculiar package by which he was deceived, that is, the bottle bearing the infringing mark and label, is retained by the deceiver.

If the deception is intentional, the knave who perpetrates it is not likely to disclose his guilt.

If the deception is accidental, any knowledge which may come to the petitioner is equally accidental, because the means of communication between the consumer and dispenser, and the manufacturer, is usually very remote. The witness Bielfeld, on behalf of the petitioner, testified that the beer of the Schlitz Brewing Company is distributed through some fifty wholesalers, and then, through them, to hundreds of retailers in the state of Texas.

In a famous English case the court says:

> "If one case of actual deception is proved, there is no more to be said on either side. The case is at an end."

That was an action involving a package of "Liebig's Extract of Meat" where the small jar or container, when purchased, is taken into the possession of the consumer and is taken to his home. The article itself is slowly consumed and frequent opportunity of seeing and examining the label is afforded. (*Liebig's etc. Co. vs. Chemists etc.,* supra.)

In the Club Soda case (*Cochrane vs. MacNish,* supra) to which we have already directed this court's attention, the judicial knowledge which the English courts take of the method of dispensing soda and soda and whiskey and the lack of opportunity of examining the label is disclosed.

In our own country, in the Appellate Court of the Ninth Federal Circuit, the *Kostering case,* supra, shows that the courts in this country take judicial cognizance of the manner in which beer in bottles is sold.

The difficulty attending the production of instances of actual deception was probably never more definitely recognized than in the case of *Von Mumm vs. Frash,* 56 Fed. 830. This was a case involving unfair competition in the sale of champagne, an article more expensive, and consumed by purchasers of a higher degree of intelligence and discrimination, than beer. The court there said:

> "Such testimony is unnecessary, where, as here, the proofs wherein the conclusion that the only reason for the dress adopted by the defendants for their product is that it may be successful to defraud the ultimate purchaser. Moreover, it is not to be disputed that the danger of injury to the complainants is creative by the defendant's method of dressing up their articles, and *the danger* of injury is sufficient ground for the interposition of a court of equity."

Thousands of customers of the Schlitz Brewing Company may have drank "Southern Select" for "Schlitz" without noticing the difference in the labels and without knowing that they

have been deceived. The witness *Selvage* puts the matter concretely when, answering a question whether he had been deceived by the *new* label of the defendant brewery: "I could not tell whether I have or not. I do not know." How could he know, unless he discovered the fraud at the time that he was drinking the beer?

The courts of this country and England have never called for proof of actual deception, except in cases of doubt where the respondent in simulating the petitioner's package or the possible consequences of such simulation was not clear. We still believe that, under the facts presented by the petitioner's bill and its affidavits, no proof of actual deception on this case was necessary to warrant this court affording the relief prayed for in the petitioner's bill.

But, to quote Judge Lacombe:

> "We are not left to inferences, however, to determine whether that purpose has been accomplished. In many cases, where simulation is plain, injunctions have been issued without proof of specific instances of deception. Such evidence, however, is always competent, and often illuminative."

PETITIONER PRODUCED INSTANCES OF ACTUAL DECEPTION.

We accepted the burden placed upon us by the trial court and have proven not only actual instances of deception, but an absolute certainty of the possibility of deception. The evidence adduced upon the hearing will be considered under the following heads:

(1) Instances of deception of the consumer.

(2) Instances of confusion by persons familiar with and skilled in the handling of bottled beer, notwithstanding their experience.

(3) Instances where representatives of the respondent endeavored to induce retailers to purchase defendant's product

for the reason that it might be easily substituted for the product of petitioner.

The evidence offered, bearing upon the use of the infringing label and package as a means of palming off the respondent's product for the petitioner's by unscrupulous dealers, has been heretofore discussed under the head of "substitution" and further reference to it will not now be made, except to repeat the charge that respondent by the use of the simulative label upon its bottled beer put into the hands of retailers the means of intentionally or accidentally palming off its goods for the goods of petitioner; that respondent put into the hands of unconscionable dealers an "instrument of fraud."

INSTANCES OF CONFUSION AND DECEPTION.

We deem a thorough and painstaking analysis of the testimony given by the various witnesses of the complainant and respondent unnecessary. The court will undoubtedly apply the law after reading all the testimony given at the hearing and the depositions offered, a transcript of which will be filed with this brief. Counsel for petitioner, however, believe that a cursory view of the testimony may assist the court.

Clarence Selvage, a commercial traveler, calling upon the saloon and bar trade to sell a brand of whiskey, and familiar with the package of Schlitz export beer, was deceived by respondent's package and did not discover the deception until the bartender called his attention to it. (Tr. pp. 61, 62.)

McIntyre, a fisherman and engineer of Brownsville, Texas, testified that he was deceived by a package of respondent's product in Bird's saloon in Brownsville, Texas (Trans. pp. 66, 67). He is corroborated by the witness *Williamson* (Trans. pp. 64.)

Taylor, a drug clerk employed at Anderson's Pharmacy in the Carter Building, believed he was drinking Schlitz beer until he noticed the difference in the taste. He proceeded to investi-

gate and discovered that he had been served with Southern Select with a brown label. (Trans. pp. 77, 78.) He is corroborate by *Barringer,* who claims to have served many others with Southern Select beer for Schlitz. (Trans. pp. 68, 69.)

Taylor also testified to another instance when he was served with Houston Ice & Brewing Company's beer for Schlitz and did not discover the substitution until he tasted the product and examined the label. (Trans. pp. 77, 78.)

W. F. Blum testified that he knew positively that Southern Select beer, bottled by the Houston Ice & Brewing Company in a brown bottle, having a brown label, has been sold as and for Schlitz beer in Temple, Texas (Trans. p. 58), and at the Liquor Dealers' Convention in Galveston, Texas, in the spring of 1914. (Trans. p. 75.)

Anderson, manager of the Brazos Hotel in Houston, Texas, was accustomed to calling for Southern Select beer put up by the Houston Ice & Brewing Company. When the beer of the respondent in its new "dress" was first brought to his attention he was deceived. He testified as follows: (Trans. p. 79.)

> "The first time I ever saw the new bottle of the Houston Ice & Brewing Company, I think was at the McAtee Bar. I ordered a bottle of Southern Select beer and I was served a bottle of beer and I thought it was Schlitz, and I called the bartender's attention to it and he says that is Southern Select and then I examined it. * * * I said you made a mistake, you served me Schlitz beer and I called for Southern Select.
>
> I had to read the label in order to tell the difference."

Anderson does not keep "Southern Select" in brown bottles bearing brown labels in the Brazos Hotel.

John T. Booth, of Beaumont, Texas, testified that he was in Lang's Oyster House in the city of Houston in the company of two representatives of petitioner and that he was served with Southern Select beer in brown bottles with brown labels, when Schlitz had been ordered, and that he did not detect the difference until his attention was called to it. (Trans. pp. 80, 81.)

Another instance of deception was furnished by *John Henicker* of Humble, Texas, who is engaged in the saloon business and sells the beer of the defendant in brown bottles with a light brown label. He testified that on one or two occasions customers had complained to him that they had been served Southern Select beer and thought they had been drinking Schlitz. Henicker, among other things, testified as follows: (Trans. p. 91.)

> "There was one man in particular, who is a man by the name of Hill, was putting in some machinery there for Mr. Bender and he was there four or five weeks a year or a year and a half ago possibly, and he came in and called for a bottle of beer and I gave him a bottle of Southern Select and he had been there three or four weeks and one day at dinner time he came over and got a bottle of beer and I thought he wanted that all the time, and one day he happened to read the label on the bottle and he said, 'I thought you knew what I drank,' that he wanted Schlitz, and I explained to him that I had not handled Schlitz for two or three years. And he said 'I know different' and he got mad and left and I told him there was no Schlitz in town and we had not handled Schlitz for a number of years and that I did not misrepresent anything. I thought that was what he wanted."

On cross examination he testified: (Trans. p. 92.)

> "I did not misrepresent anything. He liked the beer, but he had it in his head he was drinking Schlitz all the time and he happened to read the label that one particular time and jacked me up about it. * * * This customer he really thought that he was drinking Schlitz when he was drinking Southern Select."

In addition to the instances disclosed in the testimony of purchasers who were actually deceived by the simulation of its label, petitioner was able to find a number of witnesses who testified to the intentional palming off of the goods of the respondent for the goods of petitioner. This is what usually happens upon simulation of a label or "dress" of package.

The price at which dealers purchase the respondent's goods is considerably less than what they have to pay for petitioner's goods.

The retailer is usually wittingly or unwittingly a party to the fraud that is perpetrated by the use of the simulated label.

And probably in no case is it intended by the manufacturer who uses a false label to deceive the retailers of the product.

In the case of *National Biscuit Co. vs. Baker,* 95 Fed. 135, Judge Lacombe says:

> "Defendants present the usual voluminous bundle of affidavits by persons in the trade to the effect that in their opinion no one is likely to mistake defendant's biscuits for complainant's. As has been often pointed out before, IT MAKES NO DIFFERENCE THAT DEALERS IN THE ARTICLE ARE NOT DECEIVED. No one expects that they will be."

In *Von Mumm vs. Frash,* 56 Fed. 830, the defendants argued that they were guiltless because they had never stated anything but the truth in regard to their manufacture. The court characterized what they did thus:

> "They make and put in the hands of other persons, the means of fraud, knowing that these means can be, and probably will be, employed for the purpose of fraud, or to the injury of complainants. The defendants make and sell, knowingly, the tools for fraud; and they, and the knaves who buy the tools of them, intending to use them for the fraudulent purpose for which they are constructed, are coconspirators, each guilty of the fraud perpetrated in pursuance of the intention with which the tools were made, and this, although the particular person intended to be defrauded is not agreed upon between them."

In *Enoch Morgan Sons vs. Whittier,* 118 Fed. 657, Justice Morrow says:

> "In the present case the evidence shows that the goods of the defendant have been mistaken by purchasers for those of the complainant, probably by design of the dealer. And though there is no evidence connecting such dishonest

dealing with the defendant in any way, the fact that it so dresses its goods as to give an easy opportunity to the unscrupulous dealer, to delude the consuming purchaser is very persuasive evidence that intention existed to enter into competition with the manufacturer whose goods were already well established and to carry on such competition in a manner which courts of equity hold to be unfair."

In the case of *Fox vs. Glynn,* 191 Mass. 344, the court says:

"It is not true that wholesale dealers can defend on the ground that they do not mislead or intend to mislead the retail dealers to whom they sell. It is enough to require an injunction if they knowingly place an instrument of fraud in the hands of a retailer with which he may deceive the public."

See also *New England A. Etc. Co. vs. Marlborough,* 168 Mass. 154.

In *Garret vs. Garret,* 78 Fed. 472, the imitative labels were put upon goods which were sold to retailers at reduced prices.

In *Hostetter vs. Becker,* 73 Fed. 297, Justice Cox says:

"Of course, the buyers of defendant's bitters were not deceived. It is not pretended that they were, and that is not the theory of the bill as I understand it. But the defendant placed in the hands of the buyers implements which enabled them to deceive the general public."

In *Amoskeag vs. Trainor,* 101 U. S. 51, p. 63, the court says: "neither will the complainant be deprived of its remedy in equity, even if it be shown by the respondent that all the persons who bought goods from him bearing the trademark of the real owner were well aware that they were not of the complainant's manufacture. If the goods were so supplied by the wrongdoer for the purpose of being resold in the market, the injury to the complainant is sufficient to entitle him to relief in equity."

In the recent case of *Coca-Cola vs. Gayola,* 200 Fed. 720.

Wolf Bros. vs. Hamilton, 206 Fed. 611;

Gulden vs. Chance, 182 Fed. 303;

Gaines vs. Turner, 204 Fed. 553;
DeVoe vs. Wolff, 206 Fed. 420; *United Drug Co. vs. Restanus,* 206 Fed. 570, the same rule is applied.

The courts proceed upon the theory that the retailer will not be deceived. They infer that the unscrupulous retailer will be a co-conspirator in the fraud. It is not intended that the retailer shall be deceived.

But we have a case the like of which we have, as yet, not been able to find in the law books. In this case a situation is presented of which there is no parallel in any of the reports. The retailers of the respondent's beer put up in the brown bottle with brown label and other insignia thereon, have been misled and deceived by the similitude of the label of petitioner into mistaking the respondent's product for the petitioner's and *vice versa,* and have dispensed the product of one for the other by reason of such confusion.

CONFUSION AND DECEPTION OF RETAILERS AND OTHERS FAMILIAR WITH THE HANDLING OF BEER IN BOTTLES.

We will briefly discuss the instances of persons skilled in handling beer in bottles who have confused the packages of petitioner and respondent, and the petitioner's good will has been injured by honest bartenders unintentionally selling the defendant's product for that of the petitioner.

Aside from the many instances of deception practiced by retailers upon the public, as related by the following witnesses, *Peter Breit,* whose depositon was introduced in evidence, *George Barringer,* the young man employed at the Bender Hotel, and *Westley Johnson,* the porter, *John Nelson* of Temple, and *C. L. Fischer* of Beaumont, all of whom testified to deliberate substitution of Southern Select beer in brown bottles with the brown label for the product of the petitioner, and that they were

able to "get away with it," there is the testimony of honest retailers who confused petitioner's and respondent's beer because of their similarity.

Mr. Callaghan related to the court the instance of the porter on the Chamber of Commerce special train out of Beaumont, Texas, serving a large number of people with Southern Select believing it to be Schlitz beer until the error was discovered and a cask of Schlitz beer was opened. (Trans. p. 79.)

Mr. Selvage might be classed at least as a man familiar with the different brands of beer and whiskey because his business kept him constantly in touch with saloonkeepers and bar proprietors. But we have treated him as an ordinary intelligent purchaser before the bar. (Trans. p. 61.)

Mr. Buesing of San Bonita testified that he had observed his bartender two or three times a week, even though he had "gotten after him strong" unintentionally offering Southern Select beer for Schlitz and had told him not to make such mistakes. (Trans. p. 60.)

Another instance is related by John Nelson, the colored porter from Temple, Texas, who testifies that he sometimes grabbed down in the ice box and gave customers Southern Select by mistake—"Because they (the packages of petitioner and respondent) looked just alike and I cannot tell the difference in a rush." (Trans. p. 74.)

On cross examination he testified:

> "you would have to look very closely to tell whether it was Schlitz or Southern Select. You get in a hurry to get it up there and in a rush the ordinary customer he could not tell this unless he looked at the label. * * *
>
> He could not read it and *then* tell the difference. That is the only way to tell them, is to read what is on it. Some can't read, then they don't know what they are getting. * * *
>
> Don't know whether they are getting Southern Select or Schlitz, both labels are the same."

The witness *Tomlinson*, on cross examination, testified that

he had difficulty in telling Southern Select from Schlitz under circumstances like this: (Trans. p. 81.)

> "Well, you would have to look in the ice box where you put it in the ice box. You would have to look at it and notice it. If you did not you took up Southern Select for Schlitz. My clerk did that two or three times,—took up Southern Select for Schlitz. He did not discover it until I told him. * * * My clerk is a white man."
>
> I had no difficulty in distinguishing it myself except in the ice box.
>
> I would turn it over and see whether it was Southern Select or Schlitz."

The respondent's witness Schark testified that when he first started to use Southern Select beer in brown bottles he kept the bottled beer separate and cautioned his bartender not to make any mistake.

VIII.

SUBSTITUTION AS DIFFERENTIATED FROM INFRINGEMENT OF A MARK AND SIMULATION OF "DRESS."

The property right of a trader or manufacturer in his business or good will may be unlawfully invaded in two different ways.

First: When a trader or manufacturer adopts marks or "dress" or other indicia similar to those of another trader or manufacturer that some of the latter's customers are misled or likely to be misled thereby.

Second: When a trader or manufacturer has adopted marks or "dress" or other indicia which differ so grossly from the marks or "dress" or indicia of another trader or manufacturer "that no sensible man, acting on the instant, would be deceived," but sells his goods or wares as and for the goods and wares

of the original manufacturer by some trick or artifice or by misrepresentation amounting to fraud.

The latter is a simple case of substitution and involves no question of trademark rights or simulation of dress or other indicia.

The trial court in the questions directed by it to the witness Barringer and others clearly brings out the distinction between substitution induced by artifice or fraudulent misrepresentation on the part of a retailer induced and made possible by a simulated mark or package.

The witness *Barringer* testifies as follows (Trans. p. 70):

"By the Court:

Q. Suppose a customer came in and asked for a bottle of Budweiser and you did not have anything but Schlitz?

A. I would have to tell him I did not have any Budweiser.

Q. Why would you tell him that?

A. *You cannot very well fool them on that.*

Q. Suppose he came in and asked for Southern Select and you did not have anything but Schlitz, what would you do?

A. *I guess I would try to fool them.*"

The witness *Westley Johnson* testified as follows (Trans. p. 72):

"By the Court:

Q. What beer do you carry?

A. Budweiser, Select, Blue Ribbon, Pabst, Schlitz, Falstaff and Cook's.

Q. Suppose a man came and asked for any one of the beers and you did not have anything but Schlitz, what would you do?

A. If he came in and asked for a bottle of Budweiser and we did not have anything but Schlitz I would tell him we did not have any Budweiser.

Q. Suppose a man came in and asked for Schlitz and you did not have Schlitz, what would you do?

A. If a man came in and asked for a bottle of Schlitz

and we did not have any Schlitz, and we had Southern Select, we would give him a bottle of Southern Select and take chances on getting by with it.

Sometimes men come into the Bender bar who are so drunk that they paid no attention, and if they asked for a bottle of Schlitz we could give him a bottle of Southern Select or anything. There was no trouble in imposing on a drunken man."

The witness *Fischer,* who had testified that he did not handle Schlitz, but substituted Southern Select for Schlitz, on cross examination by defendant's counsel, testified as follows (Trans. pp. 76, 77):

"Q. If a man asked for a bottle of Budweiser, what would you give him?

A. I would give him Budweiser.

Q. If he asked for any beer that you did not handle, what would you give him?

A. Well, I would tell him I did not have it.

Q. Suppose he asked for a bottle of Blue Ribbon beer and you were not handling that kind, did you let him go out and miss the sale, or did you give him beer that you had that was equally as good?

A. No, sir. I would tell him I did not have it, because *Blue Ribbon and all other beer is put up in different packages.*"

Immediately preceding this cross examination by defendant's counsel, the witness had testified as follows (Trans. p. 76, just before the above quotation):

"Q. What has been the custom in your place of business, while you were running a saloon, when a man came in the saloon and asked for a bottle of Schlitz, what was he served with?

A. I gave him Southern Select.

Q. Did you have that continuously?

A. I have done it ever since I have been in business.

Q. Were you able to sell Southern Select beer put up in brown bottles with a brown label successfully for Schlitz beer?

A. Well, I got by pretty regularly with it, once in a while some one mentioned it.

Q. In serving beer, when a man comes in and calls for a bottle of beer, how do you serve it to him, would you pour it out or not?

A. Yes, pour it out and set it on the counter and let him pour the second glass himself."

The witness *Guse* testified (Trans. p. 82):

"Since the Houston Ice & Brewing Company has been selling their Southern Selcet in brown bottles, with the brown labels, I have seen it confused at the Rice bar in Houston, Texas. This was in November, a year ago, during the Houston carnival. I saw two gentlemen walk up and ask for two bottles of Schlitz beer, and the bartender reached down and got two bottles of Southern Select, and as he took the bottles up he rubbed the labels off, and I am positive they were Southern Select. I know it when I see it."

The witness *Craeger,* a traveling representative of the defendant, testified as follows in relation to *substitution* (Trans. bottom of page 105):

"Q. And you say you do not know of any instance where Southern Select has been substituted for Schlitz where the purchaser was ignorant of the substitution?

A. Well, it is very easy to substitute. You take in southwest Texas where black bottles—I have walked in and called for Southern Select and I have seen Schlitz and I have seen Cook's Pearl. I called for Southern Select and they would not have a bottle of Southern Select in the icebox.

Q. I am talking about where the purchaser has been deceived.

A. No, sir.

Q. In the territory you speak of you say that it is the practice that if they have not the beer called for they give you some other beer?

A. They would give you a black bottle of beer if they have got it, and if they have not they give you a white bottle. *But that is easily detected by me because I usually notice what they sell.*"

The testimony given by the witnesses, just quoted, all tends

to establish the difference between substitution in its strict literal sense and substitution by reason of "an instrument of fraud" placed in the hands of the retailer.

Hopkins in his work on Trademarks (2nd Ed.), Section 115, page 276, says:

> "By 'substitution' as used here is meant the substitution by a retail merchant of goods other than those called for by the purchaser. *In its narrower sense it is confined to the retail merchant who commits the offense. In its broader sense it includes the manufacturer of the substituted goods, in cases where he has so prepared the goods as to make the substitution possible.*"

In a case of substitution in its narrower sense, the retailer alone is liable. In its broader sense the manufacturer and retailer are liable, and the aggrieved party whose good will and business has been invaded may prosecute his remedy against either one or both.

The incident testified to by witness *Guse*, where Southern Select beer was served in bottles with labels removed, when Schlitz beer had been called for, was undoubtedly a case of substitution, unless opportunity had been given the purchaser to get a view of the picture which the original package presented to the eye. If the customers had no opportunity of glancing at the package in advance, the act of the retail dealer in removing the labels was an act of fraud for which he alone would be responsible.

Had the witnesses *Barringer, Westley Johnson* or *Fischer* sold Budweiser or Blue Ribbon beer when Schlitz beer was called for, their offense would have been a simple case of fraud and substitution, and they and they alone and not the rival brewery would have been chargeable with the fraud; and for the reason that the difference in "dress" between the bottled product of the Schlitz Brewing Company and the bottled product of the Anheuser-Busch Brewing Company and the Pabst Brewing Company is so "GROSS *that no sensible man, acting on the instant, would be deceived.*"

One of the earliest cases in this country which passed upon the above principle is *Morgan Sons Co. vs. Wendover,* 43 Fed. 420. Petitioners in this case were the manufacturers of scouring soap known as "Sapolio." Defendants were dealers who, when "Sapolio" was asked for, delivered "Pride of the Kitchen," a similar article, *but which was distinctly different in its appearance.* The evidence was that the defendant's clerks, when "Sapolio" was asked for, handed out "Pride of the Kitchen" *without comment or explanation.*

Judge Green in his opinion says:

> "Now, what did the transaction in the store of the defendants, as disclosed in the proofs, amount to? Simply this: When asked by the complainant's agent for a cake of 'Sapolio' the defendant's agent in response delivered a cake of 'Pride of the Kitchen,' which in effect was an assertion that the cake delivered was 'Sapolio,' the very identical soap which had been asked for. In other words, the act of the defendant's salesman was a sale of soap not made by the complainant as and for the soap of the complainant known as 'Sapolio' and thereby constituted an assertion on his part that it was 'Sapolio.' * * * That the act of the salesman in offering 'Pride of the Kitchen' in response to a demand for 'Sapolio' is, *though done silently, a positive,* unlawful act, is clear. Its unlawfulness consists in an attempt to steal away THE BUSINESS *of the complainant for the benefit of the manufacturers of 'Pride of the Kitchen.'*"

Had *Barringer, Johnson, Fischer,* or any one else sold Budweiser or Blue Ribbon or Southern Select *in white bottles bear in white labels,* when Schlitz beer was called for, no matter whether the sale was made without comment or explanation, through oral misrepresentation or trick, or by reason of the fact that the purchaser was unfamiliar with the "dress" of the Schlitz product or was drunk, the fraud would have been the fraud of the party making the sale and would not have been the fraud of the manufacturer of the article.

As Judge Knappen well says in *Rathbone vs. Champion,* 189 Fed. 26:

"But defendant is not responsible for the fact that tricky retailers represent its manufacture as that of the complainant, knowing better, *provided defendant has done its legal duty in distinguishing its own product from that of the complainant.*"

The indisputable fact, however, remains in this case that the witnesses Barringer and Johnson, who were examined by the court, and the witness Fischer, examined by counsel for the defendant, did not attempt any independent fraud of their own EXCEPT AS IT WAS INDUCED BY THE CLOSE SIMILARITY EXISTING BETWEEN THE PACKAGES OF THE PETITIONER AND DEFENDANT. THE ONLY BEER THEY ATTEMPTED TO SUBSTITUTE FOR SCHLITZ WAS THE BEER OF THE HOUSTON ICE & BREWING COMPANY CONTAINED IN BROWN BOTTLES BEARING BROWN LABELS WITH ORNAMENTAL WHITE SCRIPT AND OTHER INDICIA (THE LATTER NEED NOT HERE BE DESCRIBED).

In selling Southern Select for Schlitz they substituted to the eye of the purchaser a picture with which he thought himself familiar and which he thought he would easily recognize AT A GLANCE.

IX.

CONCLUSION.

Petitioner has sought to establish a good will of its own.

More than twenty years ago it adopted a label to maintain and extend that good will.

Ninety per cent of its beer in bottles sold in commerce between the states and in foreign countries was known as "Export" upon which was pasted a label of light brown body color with white characteristic script and block lettering on the face of it and a blue figure at the left hand side.

The label was unique.

For more than twenty years petitioner had jealously guarded this trade mark label and its property right therein.

About ten years ago respondent was one of the petitioner's agents in the state of Texas, and sold its beer in brown bottles labeled with the export label, the subject of this suit, to numerous customers in Texas and Louisiana.

Seven years ago respondent ceased to be such agent of the petitioner, and one year later it put upon *its* beer in brown bottles a light brown body colored label, of different shape and size than petitioner's, but with the letterpress in style and color similar and a blue figure on the left hand side of a field of light brown, the collocation of elements and colors previously exclusively used by the petitioner in marketing its beer in brown bottles.

It would seem apparent that upon inspection of this label of respondent, the lower court should have granted the petitioner the relief prayed for in the bill of complaint. From the testimony adduced at the hearing and reviewed before the Court of Appeals there should have been no doubt that the respondent by the adoption of the label, Exhibit "C," to the bill of complaint, and the subsequent modifications of such label retaining the color and general arrangement of elements, suggestive of the petitioner's collocation and "dress" of package, *had* invaded the petitioner's property right in its good will and that the adoption of such brown label with the lettering in style and color and the blue figure, had infringed the trade mark label exclusively used by the petitioner for upwards of twenty years.

In conclusion we submit it to be apparent from the record and the exhibits that respondents, petitioner's former agents and subsequent competitors, being familiar with the extent and character of petitioner's trade in Texas, Louisiana and Mexico, deliberately undertook to devise a label which, when used on a brown bottle, could be readily confused with petitioner's label,

as the testimony shows beyond dispute was in fact done, to the end that petitioner's good will has suffered in no small degree; that the judgment under review is erroneous, and that petitioner is entitled to the injunction and relief prayed for in its complaint.

Respectfully submitted,

RUSSEL JACKSON,
J. W. McMILLAN,
Solicitors for Petitioner.